American Bar Association Journal

The Country Lawyer

He could have gone to the city, but his roots are deep in his community. He chuckles a bit over the comparison of the "little fish in the big pond" and the "big fish in the little pond," but he likes his small town "listening post" where he is more of an arbiter than a lawyer because he frequently finds a way of patching up quarrels, both family and commercial, without cluttering up the court calendar. He serves on the school board, heads the charity drives and is the man of action whenever the community needs leadership. He makes a living, and a good one considering the resources of the community, but no fellow citizen with a problem stays away because he's afraid of the legal fee. Lawyer he is, and philosopher too, who loves the community he serves beyond the measure of money or personal honors. His principal compensation comes from the love and praise of his fellowmen.

In its 113 years of service to business, Dun & Bradstreet has observed the unselfish attitude of the country lawyer in his community. He is a source of information who often helps worthy merchants get goods on credit terms and occasionally uses his persuasive skill to help his clients collect delinquent accounts. His work, legal, social and cultural, brings honor to his name and to his profession.

This advertisement is one of a series devoted to the business and professional men who render distinguished service in their communities.

Dun & Bradstreet, Inc.
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This advertisement appeared in the Rotarian magazine for February, 1955, and is being reproduced here at the invitation of the Committee on Public Relations of the American Bar Association. This ad also will appear in Newsweek Magazine and Dun's Review and Modern Industry.

This Month's Cover

The name of Sir William Blackstone (1723-1780) has been connected with the law and legal profession since the earliest days of the Republic. His classic *Commentaries on the Laws of England* (the first volume of which appeared in 1765) was for many years virtually the only source of knowledge of English common law in pioneer America. Despite the defects of that famous work, it is now generally recognized as a masterpiece. His work was the source of knowledge of the law for several generations of American lawyers, and his influence in this country is greater than in his native land. This month's cover is a line drawing of Blackstone, done by our artist, Charles W. Moser.

May, 1955

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East Sixtieth Street, Chicago 37, Illinois
Price per copy, 75¢; to Members, 50¢; per year, $5.00; to Members, $2.50; to Students in Law Schools, $5.00;
to Members of the American Law Student Association, $1.50.

Vol. 41. No. 5. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.
Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912.

The President's Page

Loyd Wright

▪ The John Marshall Bicentennial Commission, of which Chief Justice Warren is the Chairman, has arranged to have exercises in the memory of Chief Justice John Marshall held on Wednesday, August 24 on the new Independence Mall in cooperation with the American Bar Association. The Commission and the Association joined in the invitation to President Eisenhower to deliver the principal address on this occasion. It will be a signal honor for the members of our Association to hear the President of the United States at this meeting in honor of the memory of one of the great jurists of history.

It is also most fitting that our distinguished Chief Justice will himself participate and speak on the occasion of this observance in honor of one of his illustrious predecessors.

Vice President Nixon will deliver the principal address at the Annual dinner to be held the following evening. This will be the first appearance of our distinguished fellow-member at a meeting of the Association as Vice President of the United States. We will welcome him on this occasion and hope that the heavy responsibilities of his office will not prevent his appearance with us frequently again.

The tribute to be paid Chief Justice Marshall by President Eisenhower and Chief Justice Warren will be fitting recognition of the contribution of this great jurist to our constitutional system of government. The American Bar Association is cooperating closely with the John Marshall Bicentennial Commission, created by Congress and appointed by President Eisenhower, in encouraging the Bar to carry to the public the basic principles of constitutional government which John Marshall espoused.

Chief Justice Warren, Chairman of the Bicentennial Commission, has asked that the American Bar Association serve as liaison with state and local bar leaders in arranging appropriate local programs. With the Philadelphia meeting centering nationwide attention upon the John Marshall Bicentennial, it is anticipated that state and local bar associations across the country will join, during the late summer and fall months, in organizing appropriate programs.

Walter M. Bastian, Judge of the U. S. District Court for the District of Columbia and Chairman of the American Bar Association's Committee on American Citizenship, will be in charge of coordinating the efforts of the American Bar Association with those of state and local associations. I solicit, on Judge Bastian's behalf, the cooperation of every member of the Association in this splendid endeavor. Correspondence having to do with these local observances should be directed to Judge Bastian at the American Bar Center, Chicago 37, Illinois.

A singular achievement of the Association's Committee on Judicial Selection, Tenure, and Compensation was the enactment by the Congress of the recent legislation bringing substantial increases in the salaries of our federal judges and congressmen. This recognition of the vital importance to our nation of assuring adequate financial compensation to the men in whose hands the administration of justice so largely rests is principally the result of the determination of the Chairman of the Committee, Morris B. Mitchell, and of the other members of his Committee.

While the passage of this bill benefits first and primarily the federal judiciary, it benefits more fundamentally all of the people of America, for it insures that men of ability will find it financially possible to respond to the call for judicial service. In addition it constitutes a reward, long-delayed, to the men who have carried the responsibility of judicial administration for the Federal Government.

The effects of this legislation are bound to be felt in our state courts. The recognition given by the Congress to the value of judicial services is certain to be reflected in the deliberations of our state legislatures. I hope that the Bar will lend its support to legislation in every state of the land where judicial offices are now undercompensated.

The Bar, too, benefits from this legislation. If bad cases tend to make bad law, it is equally true that good judges help to make good law. Adequate remuneration for judicial offices will help to bring and retain many "good judges" upon the Bench.

Outstanding

An analysis of amount and character of assets available for protection of policyholders will show Lawyers Title Insurance Corporation to be outstanding in the title insurance field.

STATEMENT OF FINANCIAL CONDITION AS OF DECEMBER 31, 1954

ADMITTED ASSETS

	1954
Cash	$ 2,244,295.04
Bonds (at amortized cost):*	
United States Government	$ 3,507,969.49
Municipal	1,472,001.38
Public utility and industrial	452,020.84
	$ 5,431,991.71
Preferred stocks (at lower of cost or current market)	$ 78,375.00
Savings and loan association investment share accounts	$ 309,500.00
Mortgage loans on real estate:	
F.H.A. insured	$ 4,331,597.06
Other first mortgages	61,269.50
VA guaranteed	61,139.15
	$ 4,454,005.71
Interest and rents accrued	$ 63,974.47
Accounts receivable from agents and customers	501,076.54
Notes receivable—secured	452,617.65
Stock of wholly-owned subsidiaries	75,000.00
Title plants (in Akron, Atlanta, Camden, Freehold, Miami, Pontiac, Richmond and Washington)	770,099.47
Real estate for home and branch offices	418,021.47
Other admitted assets	107,956.80
TOTAL ADMITTED ASSETS	$14,906,913.86

LIABILITIES

	1954
Accrued commissions to agents, expenses and other items	$ 273,677.79
Federal taxes on income	1,446,150.07
Other taxes accrued	223,838.47
Premiums and other payments received in advance	423,728.87
Provision for undetermined title losses of which the Corporation has notice	202,503.74
TOTAL	$ 2,569,898.94
Legal reserve	$ 3,282,431.12
Capital stock—par $5 a share	$ 3,500,000.00
Voluntary policy reserve	2,192,301.44
Surplus	3,362,282.36
TOTAL CAPITAL STOCK, VOLUNTARY POLICY RESERVE AND SURPLUS	$ 9,054,583.80
TOTAL CAPITAL STOCK, SURPLUS AND RESERVES	$12,337,014.92
	$14,906,913.86

*Bonds stated at $1,266,119.86 at December 31, 1954, were on deposit with various states for the protection of policyholders as required or permitted by law.

The Corporation has segregated and deposited in a separate bank account the sum of $36,396.68 as the re-insurance reserve fund required under the Insurance Law of the State of New York.

SETTLEMENT AND ESCROW FUNDS

The Corporation had on deposit in separate bank accounts additional funds of $3,515,729.06 at December 31, 1954, covering undisbursed amounts received for settlements of real estate loans or sales in process for customers.

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American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the Section of Bar Activities and the Section of Criminal Law are $2.00 a year; dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Insurance Law, the Section of Mineral Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Labor Relations Law and the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East Sixtieth Street, Chicago 37, Illinois.

American Bar Association

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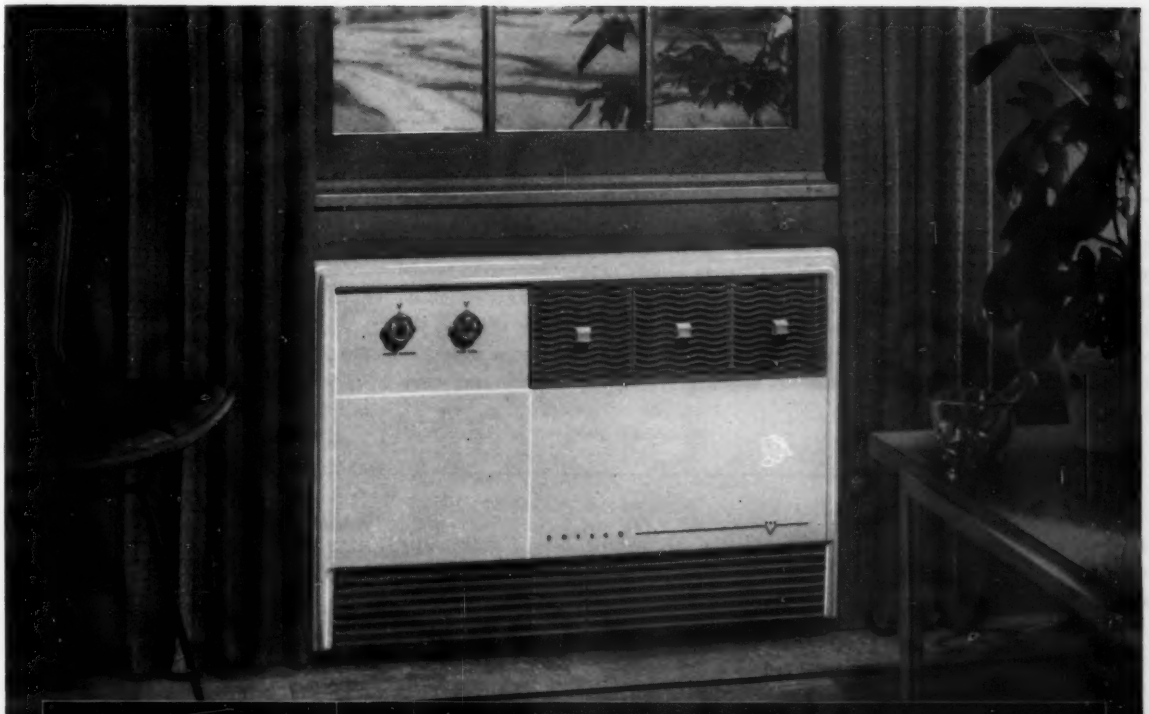

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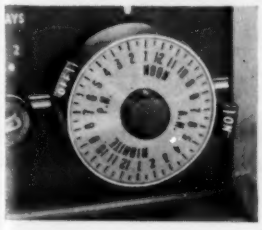

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

A Free Press and a Free Judiciary

■ I have followed, with keen interest, the articles which have appeared in the JOURNAL on the inevitable conflict, under our constitutional system, between the integrity of a free press and the impartial administration of justice.

I have been impressed particularly with the latest of those articles, that by Elisha Hanson in the current issue (March, 1955).

We of the Bar are inclined to overemphasize the importance of the point of view of the judiciary; and it is extremely worthwhile to examine closely, from time to time, the inscription of the important principles on the other side of the coin.

Without a free press, free to comment on judicial proceedings without fear of summary punishment, a free judiciary could not survive.

EBERHARD P. DEUTSCH

New Orleans, Louisiana

Not the First Symposium On Legal Ethics

■ On behalf of the *University of Florida Law Review*, I am writing in regard to an error which we made in the preparation of our advertisement which appears on page 111 of the AMERICAN BAR ASSOCIATION JOURNAL, Volume 41, Number 2 (February, 1955). A statement in our ad proclaims that we published the "first" symposium on legal ethics. Unfortunately, that is not true; the *Rocky Mountain Law Review* and possibly others have published symposia on this topic.

Last year, what is believed to have been the first complete Legal Institute on Ethics was held here at the University of Florida. Our symposium contains edited portions of the addresses and panels of that Institute. Much to our embarrassment it appears that our enthusiasm over being "first" in the Institute field was unduly expanded into the symposium.

We became aware of the inaccuracy prior to receipt of our copy of the JOURNAL, but only after it was too late to pull the ad. You can readily understand our concern in this matter, as we greatly regret having thus led the JOURNAL into error.

R. J. BECKHAM

Editor-in-Chief
University of Florida Law Review

We All Make Mistakes!

■ In the AMERICAN BAR ASSOCIATION JOURNAL for December, page 1057, is an article entitled: "Improving Our Legal Writing: Maxims from the Masters".

The article says that much of the English written by our law writers is vague, misty or sloppy. It stresses the need for improvement.

On page 1062 of the same issue appears this sentence: "Everyone *who* I have heard speak of the book said that he had presumed before seeing it that it was another biography of Franklin Roosevelt."

I wonder who was guilty of this oversight. Or was the editor merely trying to prove his point by a glaring example?

GEORGE CAHILL

St. Paul, Minnesota

Basic American Law Can Become a Living Thing

■ "The Sentence of the Court: Should There Be Appellate Review?", by Solicitor General Simon E. Sobeloff, in the January issue is excellent and may be read by the layman as well as by members of the Bar. Mr. Sobeloff is trying to analyze problems of justice which should not be overlooked or ignored. But who will take the initiative for the change? The lawyer, the judge—whether they have an inferiority or superiority complex is not for me to decide.

Maybe if the layman becomes more acquainted with the basic American law he can pass judgment on whether it should remain static or become a living thing in our life.

And the percentage of criminals in the United States would not be two and a half times more than it is in Great Britain.

PHILIP SEGAL

Flushing, New York

Segregation and the Supreme Court

■ I read the letter of Edward R. Lewis under the caption "Segregation and the Supreme Court" in your November issue with a great deal of interest.

Mr. Lewis seems to concede that the decision is logical but he questions its statesmanship. Its statesmanship seems to mean its conformity with the still small voice of the multitude in places like Alabama and Georgia. If so, I agree with Mr. Lewis.

I hope he'll agree with me that a free unenlightened Parliament, a free unenlightened press, and free

(Continued on page 393)

(Continued from page 392)

mob-dominated elections are of little help to the progress of a people, and less so to that of a minority, anywhere.

If people are to go forward, the light of wisdom must be placed in front of them. That is where it will be found in progressive communities. Usually—since men must be taught as though you taught them not—its source may not be obvious to them. The highest courts of the realm have been the source of a great deal of it in this and other ages. And always that which is seen to be new is unpopular, is unstatesmanlike.

So far from its detracting from the merits of the decision in this case it rather redounds to its credit that the learned judges in giving it were not bending their knees to the idol of popularity as statesmen are apt to do.

R. N. LEWIN

Kingston, Jamaica

New York State Law Against Discrimination

■ Frequently, I am asked if the New York State Law Against Discrimination, the pioneering law in this field, has ever been tested in the courts of the state.

It occurred to me that the affirmative answer to this question might be of interest to the readers of the AMERICAN BAR ASSOCIATION JOURNAL. The law and this Commission's administrative procedures have, in fact, been twice tested and affirmed by the New York State Court of Appeals, in *Ivory* v. *Edwards*, 349 N.Y. 947, and in *Holland* v. *Edwards*, 307 N.Y. 38.

Both challenges came from employment agencies and both involved the Commission's rulings concerning the illegality of certain pre-employment inquiries. In handing down an affirmative decision in the second case, the Court of Appeals declared that past discriminatory acts justified the wide powers in this field granted to the Commission "to appraise, correlate and evaluate the facts uncovered". The Commission had ordered the employment agency in question to desist from making inquiries which through indirection could determine the race or religion of a job applicant.

In the previous decision, written on this matter in the Appellate Division, 282 App. Div. 353, it had been declared by the court:

> Discrimination in selection for employment based on considerations of race, creed or color is quite apt to be a matter of refined and elusive subtlety. Innocent components can add up to a sinister totality.
>
> The inquiry concerning a previous change of name, plus inquiry concerning the nation of schooling, the religion of one's former employer and his wife, the national origin of one's name, may each be harmless under some circumstances, asked by some questioners of some applicants, but in their aggregate they have a curiously jarring effect. They are surely quite capable, all together, of becoming the kind of practice which the Legislature defined as harmful to the welfare of the State.

Copies of these decisions, as well as copies of the Commission's annual reports containing the interpretations and rulings of this agency, may be obtained by writing the New York State Commission Against Discrimination, 270 Broadway, New York 7, New York.

CAROLINE K. SIMON

State Commission Against Discrimination
New York, New York

Mr. Silverson and the New Revenue Code

■ Congratulations to you and to Mr. Silverson for his interesting article on the Internal Revenue Code of

(Continued on page 396)

(Continued from page 393)

1954, published in your January issue, bearing the apt sub-title "A Study in Retrogression". The article is, I think, a subtle exposé of the influence of lobbying on the men who make the tax laws.

It has long been a source of amazement to me how the oil people can get by with the subsidy which they collect from the other taxpayers, and I see that Congress, instead of correcting this, is extending the same benefit to other minerals, although to a lesser degree.

The catch phrase which the stockbrokers used about "double taxation" in obtaining the credit for dividend income is, also, not at all persuasive to me, and at the time when this measure was pending I wrote to my Congressman and Senators suggesting that a restoration of the earned income credit would be more appropriate.

I hope that the Bar Association, and other professional associations, will get together to try to put over the Reed-Keogh bill. Apparently a good deal of pushing is going to be required to do it, and while they are about it, they might, as a service not only to themselves but to the vast majority of individual taxpayers, try to obtain the enactment of an earned income credit.

FULTON W. HOGE
Los Angeles, California

Death Sentences for Spies

■ In the article "The Rosenberg Case" appearing in the December, 1954 issue of the JOURNAL, page 1049, it is stated that "the statutory power to execute now exists only when espionage is conducted in time of war."

The death sentence for espionage was authorized for offenses committed during peace time by Section 201 (a) of Public Law 777, 83d Cong., 2d session, approved September 1, 1954.

WELLINGTON F. SCOTT
Cambridge, Massachusetts

A Constitutional Amendment on Our Patent Laws?

■ I have had some time to think about Logan R. Crouch's stimulating article in the February, 1954, JOURNAL, "The Inventor in the Courts".

I agree with the main thesis therein, that the inventor often has a hard time convincing the courts that he has invented something patentable. But the reason for this is that a patent can at times be such an economic sledgehammer. For instance the Selden patent might have wrecked the Ford Motor Company if held valid during its statutory seventeen years of patent life. This may well have resulted in the hardship of considerable unemployment and loss of risk capital.

The basic difficulty seems to be that the constitutional basis of patent, drafted in 1787, needs amending to fit a more complex modern industrial era. There should be provision for mandatory licensing of patents.

I suggest that the clause of Article I, Section 8 (listing the powers of Congress), the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" be amended by adding the following proviso: "provided, however, that Congress may establish procedures whereby inventions and discoveries may be required to be licensed to others upon payment of a reasonable royalty".

Congress can be relied upon to draft a formula to protect both the inventor and the public interest. I believe the Bar can furnish a real contribution to the national welfare by discussion and leadership in this reform.

GRIER S. KESTER, JR.
Columbia, South Carolina

Activities of Sections and Committees

SECTION OF CRIMINAL LAW

■ At the Midyear Meeting of the House of Delegates, the Section of Criminal Law proposed four resolutions, which were acted upon as follows:

(1) Approval was given a proposed amendment to H. R. 789, the so-called wire service bill, aimed at controlling the interstate transmission of certain gambling information, which the Association has heretofore endorsed. The amendment adds language designed to overcome the ruling of the FCC in *Katz* v. *Chesapeake & Potomac Telephone Co.* (80 P.U.R. 76, 86 P.U.R. 65) by compelling communications carriers to obey the orders of law-enforcement officers with respect to the suspension of service to gambling establishments, while simultaneously conferring immunity from any civil liability arising out of such compliance.

During the discussion, an addition was suggested by spokesmen for the Section of Administrative Law, which was adopted, after discussion, by the House of Delegates. This requires that the law-enforcement officer ordering a carrier to suspend service must first have obtained the concurrence of a court of competent jurisdiction, in a proceeding analogous to an application for a warrant.

H. R. 789 has already been reintroduced in the House of Representatives as H. R. 4073, containing the amendment as proposed by the Section; the same bill, with the amendment plus the proposal of the Section of Administrative Law, has been introduced in the Senate as S. 3190. The author of the House bill will probably accept the Senate version, so that the final recommendations of the House of Delegates will be promptly considered in both Houses of Congress.

(2) A second resolution proposed endorsement of the suggestion advanced by Solicitor General Sobeloff, (see 41 A.B.A.J. 13) to permit appellate review of the sentences meted out in federal courts. Action by the House was deferred to await the introduction in Congress of specific legislation on the subject.

Such a bill, sponsored jointly by Senators Kefauver and Watkins in the Senate (S. 1480) and by Representatives Keating and Lane in the House (H. R. 4930 and H. R. 4932) has been introduced.

(3) The third resolution, originating with the Section's Committee on Narcotics and Alcohol, proposed negotiations with the American Medical Association looking towards a joint study of the narcotic drug traffic and related problems, and put the American Bar Association on record as urging Congress to undertake a full re-examination of the Harrison Act and related federal statutes. Negotiations with the American Medical Association are already under way, and have aroused considerable interest. A resolution calling for the congressional study, S. Res. 60, was introduced on February 21, 1955.

(4) The final resolution, developed by the Section's Committee on Juvenile Delinquency, was withdrawn pending determination as to the status and jurisdiction of the proposed new Section of Family Law, which, if created, would properly concern itself with juvenile problems and thus make the special committee recommended by the Section unnecessary.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

■ Senator John J. Sparkman, of Alabama, a member of the Senate Foreign Relations Committee, will be the principal speaker at the traditional luncheon of the Section at its spring meeting in Washington, D. C. Arthur H. Dean, of New York, Section Delegate to the House of Delegates and special ambassador in the Korean truce negotiations, will also speak at the luncheon, which will be held in the Chinese Room of the Mayflower on Thursday, May 19, at 12:30 P.M. A Section meeting will follow the luncheon in the same room. The Council of the Section will meet in the North Room of the Mayflower at 9:30 A.M. on the same day.

Harry LeRoy Jones, Department of Justice, Washington, D. C., has been in charge of arrangements for the Washington meeting. It is hoped that many members of the Section will be able to attend. The price of the luncheon will be four dollars. Further details as to tickets, etc., will be announced in the annual spring letter of the Section.

COMMITTEE ON LEGAL AID WORK

■ It has been almost five years since the American Bar Association adopted the following statement of purpose:

> RESOLVED, That it is the primary responsibility of the legal profession, as a part of its high tradition of service to the public, as an expression of its devotion to the ideal of equal justice for all . . . to assume, through the bar associations and in conjunction with other social and welfare agencies, the leadership in establishing and maintaining adequate organized legal aid facilities in all parts of the country.

Your Committee has accepted this challenge and, with the excellent help of the National Legal Aid Association, great strides have been made to implement this inspired resolution. Since the adoption of this statement, forty-three new legal aid organizations have been established.

This represents an increase of 39 per cent over the number existing at that time. In the last year, fourteen new offices have been opened, making the total 153.

Your Chairman has necessarily been very active in this development program. Answering the increased volume of mail, responding to requests for written material on Legal Aid, and the scheduling of meetings for our field directors requires a great deal of time.

This, however, is not all. Your Chairman receives invitations to address bar associations and other groups working in the promotion of legal aid work. These appearances included one speech before the Superior Court judges of the State of Illinois.

We are pleased to announce that Junius L. Allison has joined the National Legal Aid Association as Field Director for that organization and our committee on a full-time basis. His office is in the new Bar Center. During the year he worked with us, he travelled more than 25,000 miles, visiting bar associations and community groups for the purpose of promoting the work of the National Legal Aid Association and our committee.

Of the sixty-seven cities with 100,000 population that did not have organized legal aid services a year ago, Mr. Allison has visited fifty-two. Plans are being made to arrange meetings in the other fifteen in the near future.

To show you some of the bright spots in this program, I list the following cities where bar associations have been particularly active in legal aid promotion: Tulsa, Oklahoma, Media, Pennsylvania, Roanoke and Alexandria, Virginia, Niagara Falls, New York, Worcester, Massachusetts, Birmingham, Alabama, Utica, New York, Jackson, Mississippi, Evansville and Hammond, Indiana, Topeka, Kansas, Poughkeepsie, New York, Sacramento, California, Clearwater, Florida, Beaumont, Texas, Springfield, Illinois.

The job is far from being finished. In fact, with our increasing population, each year sees new cities which must be added to the priority group. There still remain about 60 such population centers that do not have organized legal aid services.

We need more help, more time and more money to do this job adequately and in a manner which will be a credit to the American Bar Association.

One interesting and significant aspect of this field work is that it cannot be isolated from the other services and responsibilities of our profession. Constantly, we discover that in our contacts with lawyers and judges over the country, we are called upon to answer questions or give information concerning lawyer reference, American Bar Association membership, contributions to the Bar Foundation, public relations, publications of our association and convention activities. Therefore, in addition to responding to our professional obligation in the area of free legal aid for the poor, we must, in a sense, be ambassadors of good will for our whole association.

This work will continue, but we need your active support and encouragement. The National Legal Aid Association is constantly on the job promoting new legal aid services and keeping the existing organizations active and efficient but, since we have joined hands to make this promotion a joint project, we must all concentrate on carrying out our resolution to make legal aid available to all who cannot afford to pay.

Traffic Court Conferences—May-June, 1955

University of Georgia	Athens, Georgia	May 11-13
University of Illinois	Urbana, Illinois	May 23-25
Ohio State University	Columbus, Ohio	June 1-3
Albany University	Albany, New York	June 13-15
University of Washington	Seattle, Washington	June 23-25

COMMITTEE ON TRAFFIC COURT PROGRAM

■ Since 1947, the American Bar Association, in cooperation with the Traffic Institute of Northwestern University, has been conducting three and five day Traffic Court Conferences at leading law schools throughout the country.

Aside from its key role in a community's traffic safety program, the traffic court has another and possibly greater importance. The only first-hand experience most Americans have with our judicial system is through the traffic court. By fair, impartial handling of traffic cases, the court can become a bulwark of our democratic system—or it can sow the seeds of cynicism and discontent by following the doctrine of special privilege.

The continuing seriousness of the traffic accident and congestion problem points up the need for improved court handling of traffic violators. The traffic court conference has this as its principal objective.

The Traffic Court Conferences to be held during the next few months are listed in the table above.

These Traffic Court Conferences are intended for judges, prosecutors, court officials and attorneys interested in traffic courts and traffic problems.

Further information regarding the programs and material available may be obtained from the Special Committee on Traffic Court Program, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois.

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Nature, Man and Law:

The True Natural Law

by George W. Goble • *Professor of Law at the University of Illinois*

■ **The subjects of the natural law and the judicial philosophy of Mr. Justice Holmes have been the theme of several articles in the Journal in recent years. Professor Goble here shows that our knowledge of science and the history of the moral evolution of man refute the idea that "natural law" in the classical sense exists; that is, that the idea of classical "natural law" itself is unnatural and wholly man-made; he also shows that Holmes in his opinions was influenced by deep moral beliefs. Thus Professor Goble's views are in direct conflict with those who believe that Holmes' opinions were based upon a philosophy which was devoid of moral considerations, and he also points out the very real dangers to human freedom and progress of attempting to determine absolutely and forever rules for the guidance of the human race upon the basis of dogmatic beliefs derived from the "natural law".**

■ Man has observed that there is a certain regularity in the rising and setting of the sun, in the precession of the equinoxes, in the sequence of the seasons, in birth, death and heredity among animals and plants. He has learned certain mathematical and scientific principles which enable him to plan and construct things. An architect can build a bridge, a dam, a skyscraper or a cathedral in accordance with known principles of physics and design, and the structure will stand despite gravity and the elements. An engineer can make machines that fly; he can make pictures that move and talk; he can transmit sound and images by means of electrical waves. A physicist can convert atoms into energy. A chemist can create substances that prevent and cure disease. This is dramatic testimony to the accomplishments of the masterpiece of nature's creation, the human brain. In certain areas, physical things seem to be controlled by laws that man can learn, thus enabling him to understand and predict. Even if the order which these laws seem to indicate does not exist objectively, but only subjectively, the laws have made it possible for man to do things he otherwise could not have done—to do things which the lower animals cannot do.

Among other attributes, the mind has the power to project itself beyond the scope of its capacity as a clearing house for its sensory organs and by the process of creative imagination to form new conceptions. These conceptions, serving as tentative goals in investigation and thinking, frequently lead to new information and thus to a continual enlargement of the field of knowledge. "There seems no limit to research" says Dampier-Wetham in his *A History of Science*, "for . . . the more the sphere of knowledge grows, the larger becomes the surface of contact with the unknown".[1]

Is it not also possible that there are means possessed by man, other than the rational process, for ascertaining truth? May not some men (perhaps all in some degree) be capable of insights into reality without these insights being verifiable by rational procedures?[2] Do not the poet, the dramatist, the artist, the composer, the religious leader capture and reveal to others glimpses of a reality not manifested by mere rationalism?[3] Love, friendship, sympathy and beauty are no less real because they cannot be put into logical terms. The music in *Aida* and the form of Venus de Milo are no less beautiful because their beauty cannot be proved to one who does not appreciate opera or art.

But notwithstanding man's power to gain insights into nature by perception, rationalization, imagination

1. Dampier-Wetham, A History of Science (1930) 491.
2. "Consequently, although we must keep all our confidence in our science, we must not blindly believe in its actual almightiness. We must not forget that the activities of the brain are far from being all known, and that rational thinking may very well be only one of them, conceivably not the most reliable or the fastest." Lecomte du Noüy, Human Destiny (Longman's, Green & Co., New York, 1947) 39.
3. See Joseph Wood Krutch, The Measure of Man (1954) Chapter 11 for persuasive support of this view.

or intuition, upon reflection it is seen that this power exists with respect to only a very small part of the universe. Beyond the range of man's sensory organs, it cannot be stated with any assurance that there is order or regularity, and therefore comprehension of the nature of that region is impossible and predictions concerning it cannot be made. Man's sense-perceptions, even with the aid of instruments, do not extend to the very small things like the inside of an atom (the microphysical world) nor to the very large things like galactic systems (the mega-physical world). Thomas Gold, a Cambridge cosmologist, has recently pointed out that while objects of moderate size like the human body and the solar system appear to comply with rational laws, very small objects, like subatomic particles, and large collections of objects, like galactic systems, defy these laws.[4] New and different theories are contrived from time to time in an attempt to explain the peculiar behavior of these objects or masses, but so far none has been proposed which explains all observed phenomena or establishes any unifying principle by which the universe is regulated. For example, no one has yet explained why galactic systems, in defiance of the law of gravity, seem to be fleeing at tremendous speeds away from one another.[5] In these remote areas there is little evidence of regularity, but rather evidence of the opposite. "A few years ago", says Dampier-Wetham, "the exact accuracy of Newton's law of gravity and the permanence of the chemical elements were thought to be quite certain, and in fact the probability in favor of those principles was so great that we all should have been willing to bet our last shilling at long odds on their truth. Yet Einstein and Rutherford have proved that we were wrong. . . ."[6] Lincoln Barnett in his book, *The Universe and Dr. Einstein*, observes: "While these systems are distinguished by constantly increasing mathematical accuracy, it would be difficult today to find any scientist who imagines himself, because of his ability to discern previous errors, in a position to enunciate final truths. On the contrary, modern theorists are aware, as Newton was . . . that their particular perspective may appear as distorted to posterity as that of their predecessors seemed to them."[7] "Newton told us" says Joseph Krutch, "that the mysterious heavens were as knowable to common sense as our own back yard; Einstein tells us that our own back yard is as mysterious as the heavens were ever supposed to be."[8] And Professor G. C. McVittie in his *The Challenge of the New Conception of the Universe* remarks, "If the doctrine of a rational External World is accepted, past experience forces us to conclude that science is everlastingly in error, a Kepler, a Newton or an Einstein periodically 'proving' that his predecessors were mistaken."[9]

But it is impossible to say whether this lack of order exists in fact or only appears to exist because of the incapacity of the human mind to comprehend it. It is as reasonable to assume that it is due to the disorder of the human mind as to any actual objective disorder in the universe itself.[10] At any rate it would be extremely irrational for one to make a generalization about the universe based upon his own intellectual limitations. It would be like a donkey saying, if he could talk, "There is no such thing as mathematics."

Suppose all men were blind and deaf, is it not likely that their conception of the earth and the universe would be quite different from ours? And yet no doubt they would feel as certain of the validity of their conceptions as we do of ours. Or suppose all men had a sixth and a seventh sense in addition to the five they now have, what would be their conception of the universe? Lecomte du Noüy in his *Human Destiny* states that "there are waves of all kinds and sizes in the universe, only a small number of which are transformed by our senses into light, heat, sound, etc."[11] What would we perceive if we had sensory organs to catch the other waves?

Dampier-Wetham says, "Thus experience confirms modern theories . . . that the generalizations or laws established by induction even when universally accepted as true should be regarded only as probabilities."[12] Lincoln Barnett believes that the "certainty that science can explain how things happen began to dim about 20 years ago. And right now it is a question whether scientific man is in touch with 'reality' at all —or can ever hope to be."[13] Eddington,[14] Russell[15] and du Noüy[16] have expressed similar views. For one to assert that the universe is either orderly or disorderly is to state an absolute upon the basis of observation of only an infinitesimal part of the whole. All we can say with assurance is that the general existence of order or disorder has not been and probably cannot be rationally established.

4. TIME, September 27, 1954, page 49.

5. See the Sandage report of a 20 year study of 800 galaxy systems read at the 1954 meeting of A.A.A.S.

6. Dampier-Wetham, *op. cit.* 460.

7. Lincoln Barnett, THE UNIVERSE AND DR. EINSTEIN (1948) 111.

8. Krutch, *op. cit.* 188-189.

9. McVittie, *The Challenge of the New Conception of the Universe* (mimeographed 1954) 2.

10. "But we must not confuse these human, subjective laws which our intelligence has superposed on facts, with the true, eternal laws which will, perhaps, always escape us. As we have already stated, our laws are conditioned by the structure of our brains and our sense organs and express the succession of our states of consciousness, of our sensorial impressions. It is possible that this succession corresponds to objective reality, and that the absolute laws do not differ from those we have established, but we cannot prove it." Du Noüy, *op. cit.* 14. "It is not Nature which is incoherent but man who is ignorant." *id.* 204.

11. Du Noüy *op. cit.* 16.

12. Dampier-Wetham, *op. cit.* 460.

13. Barnett, *op. cit.* 8.

14. "The frank realization that physical science is concerned with a world of shadows is one of the most significant of recent advances. . . . The modern scientific theories have broken away from the common standpoint which identifies the real with the concrete. I think we might go so far as to say that time is more typical of physical reality than matter." A. S. Eddington, THE NATURE OF THE PHYSICAL WORLD (1929) xv and 275.

15. "The main point for the philosopher in modern theory is the disappearance of matter as a 'thing.' It has been replaced by emanations from a locality—the sort of influences that characterize haunted rooms in ghost stories. . . . All sorts of events happen in the physical world, but tables and chairs, the sun and moon and even our daily bread, have become pale abstractions, mere laws exhibited in the succession of events which radiate from certain regions. . . . In a word 'matter' has become no more than a convenient shorthand for stating certain causal laws concerning events." Bertrand Russell, PHILOSOPHY (1927) 106, 280.

16. "It is clear, therefore, that expressions such as 'scientific truth' should only be taken in a very limited sense, and not literally, as the public so often does. There is no scientific truth in the absolute sense." Du Noüy *op. cit.* 15.

The Vast Unknown . . . *Man's Insignificance*

The incomprehensible is not merely in the heavens; it is in so familiar a thing as a rose, it is in our minds and our bodies, it is all about us. Who has yet been able to resolve the power that creates life, that produces intelligence, that incites love, that activates conscience, that inspires the appreciation of beauty? Who understands the power that directs a migratory bird in a straight line to a dot of an island in the ocean 3000 miles from its starting point, or the force by which the leaves of a giant redwood are able to draw their sustenance from the earth 300 feet below? Apparently the brain is not constructed so precisely as to be capable of understanding such matters, even though it knows that they exist. In the face of the universe, man is a weak and groping creature. And the more the mind sees, the wider becomes the horizon beyond which lies the unseen. There is always a field beyond man's mental conquests —beyond even his imagination and emotional range. There is always the vast unknown. To quote from Lincoln Barnett again, "In the evolution of scientific thought, one fact has become impressively clear; there is no mystery of the physical world, which does not point to a mystery beyond itself. All highroads of the intellect, all byways of theory and conjecture lead ultimately to an abyss that human ingenuity can never span. For man is enchained by the very condition of his being, his finiteness and involvement in nature."[17]

The totality of man's knowledge, derived by whatever means, is therefore infinitesimal when compared to the universe. Yet the sphere of the known, as small as it is, furnishes a basis for reason and science. The sphere of the unknown, with its indeterminate immensity, makes room for belief in God. This is all the more so because by the mathematical law of probability the earth is not old enough for life on it to have originated by chance.[18] Knowing his power, man has dignity, integrity and a sense of responsibility. Realizing his limitations he has tolerance, humility and reverence. Dampier-Wetham says, "The first thing a reasonable man must do is to be content with a very little knowledge and a very great deal of ignorance."[19] One of man's eternal problems is to learn how to adjust himself to the capabilities and the limitations of his mind in the universal scheme of things. Insensibility to the importance of this accomplishment is one of the principal causes of unhappiness, fear, suspicion, frustration, crime and war.

Viewed in perspective the unknowable offers an adventure. It is a challenge to man's fullest intellectual and spiritual powers.[20] Justice Oliver Wendell Holmes once said that "Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal. . . . We all, the most unbelieving of us, walk by faith. We do our work and live our lives not merely to vent and realize our inner force, but with a blind and trembling hope that somehow the world will be a little better for our striving."[21] We believe many things that we cannot prove. We act daily upon the basis of faith. I entrust my valuables with a friend though I cannot prove that he is trustworthy. I believe in the greatness of my profession, my country and its national traditions, though I cannot prove that they are worthy of my faith. I believe in the beneficent power of love, sympathy and charity though I cannot comprehend their meaning. I believe in the moral and spiritual values of our religious and cultural heritage, but I cannot prove that they are eternal verities. I believe in these things because their truth seems more probable than their falsity. For the same reason I believe in God, and in the dignity and spirituality of man.

George W. Goble has been Professor of Law at the University of Illinois since 1921. He received his A.B. degree from Indiana University in 1913 and his LL.B. at Yale in 1915. He has been visiting professor of law at Yale, Columbia and Cornell.

Truth and Untruth . . . *The Line Is Not Precise*

There is, therefore, a region of the known and a much larger region of the unknown. But the division between these two areas is not a line. One area is not white and the other black. They are commingled. There is mostly an area of gray with varying shades from white to black. In this gray area things are not true or untrue. Rather they are true or untrue as judged from a particular sys-

17. Barnett, *op. cit.* 113.
18. Du Noüy *op. cit.* 34-36.
19. Dampier-Wetham *op. cit.* 472.
20. Justice Oliver Wendell Holmes expressed his philosophy on this point in these words, "So long as I am capable of my best, I want to put it to my work. A man's spiritual history is best told in [what] he does in his chosen line. Life having thrown me into the law, I must try to put my feeling of the infinite into that, to exhibit the detail with such hint of a vista as I can, to show in it the great line of the universal." *Justice Holmes to Doctor Wu* 15-16. "Part of life is to feel a direction for effort before it is definitely and articulately known and to persevere with faith. That at least was my case. If I were dying my last words would be: Have faith and pursue the unknown end." *Id.* 24. "Harvard and Yale, as cloisters of philosophy, are keepers of the sacred fire. There are trained the martyrs of the future,—the pale acolytes of science. There are gathered those who believe that thoughts are mightier than things. There are the strongholds of ideals more remote and vast than fortune. There is kept alive the faith which sets men to a task of which they shall not see the end, and which perhaps may be unaccomplished when the last of the race shall die. There is believed the idealist's creed, which even sceptics may share, that the world cannot mean less than the farthest-reaching thought, cannot be less worthy of reverence than the loftiest aspiration of man, who is but a part of it, but a leaf of the unimaginable tree." SPEECHES (1934) 50-51.
21. Holmes, SPEECHES (1934) 96, 93.

tem of reference or they are probable or improbable, plausible or implausible.

Some phenomena are so probable that they approach certainty. Others are only slightly possible. Astronomers predict that on August 11, 1999, there will be a total eclipse of the sun visible at Cornwall, England.[22] It is possible, but so extremely improbable, that some sort of solar cataclysm will prevent, advance or delay this celestial event, that the mathematical chances of its coming off within seconds of the scheduled time are probably several thousands to one. I think it likely that Lloyd's would refuse to issue a policy of insurance against the event. Yet the event is not quite certain. It is only highly probable. Some "astronomers" predict that by August 11, 1999 (the day of the eclipse), the moon will have a little sister man-made satellite circumambulating with her about the earth. According to my limited knowledge of the subject, I would say that it is possible that this event will happen, but that it is highly improbable. Such predictions as these assume the truth of certain facts and the validity of certain physical laws. The statements are, therefore, not only predictions; they are affirmations of the truth of facts and the validity of laws.

But even facts are "true" only as judged by a selected system of reference. With reference to the earth a body can be in a perfect state of rest, but with reference to the sun or other planets it is in motion. On a small scale, two plumb lines are parallel. On a larger scale, since they will meet at the center of the earth, they are at an angle. If we thoroughly mix half a test tube of white powder with half a test tube of black powder, the result as viewed by the naked eye is a full test tube of gray powder. If a very small insect finds himself in the powder, he will see no gray powder, but only black and white boulders. If we examine the mixed powder with a microscope we shall find that it consists of small white grains and small black grains. None of them will be gray. So from one scale of observation it is true that the test tube contains a gray powder, from another it is true that it contains black and white boulders, and from a third it is true that it contains black and white grains. But no one of these truths is absolute or universal. What is true with respect to the substance in the test tube depends upon the scale of observation.[23]

In the Social Sciences . . . *Is Not Certainty an Illusion?*

What has been said primarily with reference to the physical sciences seems to apply with even greater force to the biological and social sciences. If it is difficult to ascertain facts and formulate laws with respect to inanimate things, it is much more difficult to do so with respect to things that are alive. Life alone introduces a factor whose force is hard to calculate. But when there is added to life, as there is in man, the factors of intelligence, conscience, will, the passions and all the other emotions, in both the observer and the observed, the formulation of laws concerning man's conduct becomes almost, if not quite, impossible. Can we, in the field of the social sciences, speak in terms of absolutes?[24] Is not certainty in this area only an illusion?

If we shifted from one system of reference to another we would discover the same lack of absolutism in the organic kingdom as exists in the inorganic. But using our particular frame of reference, as to lower forms of life perhaps we can formulate some laws that are fairly workable. The life of an angleworm, for example, is narrowly circumscribed. Its reactions to various kinds of stimuli follow a rather fixed pattern and can nearly always be predicted. Its movements in the soil toward or away from the surface are determined in accordance with conditions of temperature, moisture and other physical factors. The worm exercises no choice. It has no discretion. It would seem to be controlled by a natural law which is almost as inexorable as the law of gravity. The conduct of the robin which feeds on the worm is determined by a law not quite, but almost as inflexible as the law governing the worm. All robins with rare exceptions are of the same size, the same color; they fly alike, hop alike, sing alike, eat the same food, have the same habits as to mating, building their nests, raising their young and migrating. They always have been the same since they became robins. It would seem that, using our frame of reference, robins are governed by a natural law which is almost invariable.

The same is true of all lower animals in large degree. But as we consider animals higher and higher in the scale, the laws controlling their conduct become less and less inexorable. Prediction as to their actions becomes more and more imprecise. Nevertheless, even a chimpanzee, the most intelligent of the lower animals, seems to be largely subject to forces beyond its control and to have only a limited capacity to think, learn and make decisions.

Man's Freedom of Choice . . . *Is It Subject to Natural Law?*

But when we pass from the brute to man we make a big jump. The mind of man, as limited as it is when confronted with the infinitely complex problems of the universe, is still the most effective device ever created for pursuing the truth. While man is extensively controlled and restricted by nature's laws insofar as his animal existence is concerned, he is capable of abstract thought, of learning by experience, of exercising free choice and of forming judgments about himself and others. Are there natural laws by which man is controlled or ought to be controlled in this area of thought and free choice, and if so what is their nature?

There must have been some man in prehistoric times who formulated the first moral judgment in the history of the world. If so, the decision of that one man may well be characterized as the most significant event of all time. One can only speculate

22. Eddington *op. cit.* 299.
23. Du Noüy *op. cit.* 10-11.
24. See Jerome Frank, COURTS ON TRIAL (1949) 17-22, 152.

on the nature of that event. It is possible that it happened something like this. A strong, ferocious cave dweller, whom we shall call Xenophon, who, by the use of sticks and stones had killed many a man who had angered him or stood in his way to food or woman, one day attacked Zeno, another husky. After a terrific hand-to-hand battle, Xenophon knocked Zeno down, jumped upon him, and picked up a boulder with which to bash in Zeno's head and finish him off. As Xenophon, sitting astride Zeno, with uplifted stone looked into his countenance, which was to be effaced, a thought flashed into Xenophon's brain. He had already proved his superiority over Zeno. It was not now necessary to kill him. Maybe he ought to let him live. So Xenophon dropped the stone, arose from his position astride his victim and walked off. He looked back once or twice at the supine form, as if to question the decision he had made, and then moved on. Xenophon had exercised a free choice between what his animal instincts dictated and what for some reason or other he felt he ought to do. At the moment that he chose to do what he ought to do, conscience was born.[25]

Why Xenophon so decided, when no other man had ever done so before, cannot be explained. Perhaps it was caused by chance. Perhaps it was caused by a biological mutation in Xenophon. Perhaps, as life itself, it was caused by divine intervention. Anyway it happened. Now the question is would any of Xenophon's compatriots or descendants do the same thing, or was Xenophon the only man in the world who would ever have a conscience? What other men would do would perhaps turn upon what followed Xenophon's unprecedented act. Conceivably Xenophon's compassion toward Zeno might set Zeno to thinking. Zeno might say to himself: "If Xenophon had not withheld the lifted stone, I would now be dead. Why did he do it?" Perhaps Zeno saw Xenophon the next day. Xenophon looked at him, but passed him by apparently without regretting his charitable act of the day before. Zeno was puzzled. Sometime later he snared an extra dodo on his hunting rounds. He carried it to Xenophon and dropped it in front of him. Xenophon took the bird and ate it. Xenophon for the first time experienced a glow of joy at having spared Zeno's life. He thought, "It is good to spare a life. He will bring me food." Zeno noticed Xenophon's pleasure. So Zeno also was pleased, and he said to himself, "It is good to spare a life." The story was told to others, and they all said, "It is good to spare a life." In due time, perhaps after many thousands of years, it was written "Thou shalt not kill." A moral law had evolved.

If Xenophon had regretted his softness toward Zeno and later had provoked him to another fight, or if Zeno in no way had recognized Xenophon's beneficent act, Xenophon would not have gained any benefit or have experienced any joy from his action. He would then no doubt have reverted to his animal type, and no moral law would have evolved from his conduct. Whatever it was that caused Xenophon's first moral judgment, there was no law that coerced man's conscience to respect this judgment, until experience demonstrated that the judgment was good. The law grew out of experience. This experience may be called conscious evolution.

The Natural Law . . .
Classical Philosophy

According to classical philosophy, of which Cicero was a noted exponent, the term *natural law* should be expanded so as to apply not only in the field of man's animal existence, but also in the area of thought and free choice.[26] This view recognizes that while laws do not *control* man in the area in which he may make choices, there are rules by which he *ought* (by free choice) *to be controlled*, and that these are part of a system of *natural law*. Natural law, as applied to man, thus includes *moral law*, and moral law, according to this view, is made known to man by God through revelation or through reason.[27] For man to be moral he must be obedient to this law. "According to the classical natural-law theory" says Dean Pound, "all positive law, *i.e.*, the whole body of legal precepts that furnish the grounds of actual decision in the courts [is] but a more or less feeble reflection of an ideal body of perfect rules, demonstrable by reason, and valid for all times, all places and all men."[28] Rules or statutes which conflict with it are therefore invalid.

Since reason is fallible, the principal problem posed by this view of natural law is how or by whose reasoning is this infallible law to be determined. When two or more men or groups of men of equal sincerity believe themselves to be endowed by the Creator with the power to ascertain and enunciate it, and they are in disagreement, by what criterion is the choice to be made between them? History reveals a heavy mortality rate among so-called "absolute and infallible" principles of law—both moral and scientific. History furnishes so many examples of fighting faiths later rejected as unconscionable that it is difficult for one to believe that sincerity or certitude of conviction is a reliable test of truth. Running back through the

(Continued on page 473)

25. "Up to the birth of conscience, the being who was to become man only differed from his ancestors morphologically. He was subject to the laws of nature, to the laws of evolution, he had to obey, and that was right. The moment he asked himself the question as to whether an act was "good" or whether another was "better", he acquired a liberty denied to the animals. . . . The truth is that in man, and in man alone, the possibility of this choice has been transformed into a moral idea, whereas this is not the case in any other species. When this occurred, man took another leap and increased the gap which already separated him from the other primates; the new orientation of his evolution was clearly indicated. Henceforth, contrary to all the others, in order to evolve *he must no longer obey Nature*. He must criticize and control his desires which were previously the only Law." Du Noüy *op. cit.* 109.

26. Aristotle's theory of natural law was different. Cornelia Le Boutillier says "Aristotle suggests that the law of nature is the practical device of man. Cicero sees it as God-given, God-sponsored, God-guaranteed" Le Boutillier, AMERICAN DEMOCRACY AND NATURAL LAW (1950) 66. See also Edwin W. Patterson, JURISPRUDENCE (1953) 337.

27. See Father Francis E. Lucy, *Natural Law and Legal Realism*, 30 GEORGETOWN LAW JOURNAL (1942) 493 at 528 where the concept of natural law is narrowly limited to basic principles of morality.

28. Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 802 (1923).

Justice in the Soviet Union:

The Trial of Beria and Aides for Treason

by John C. Hogan

▪ One of the greatest state trials of the twentieth century was that of Lavrenty Beria, head of the Soviet Ministry of Internal Affairs and chief of the dreaded M.V.D., which allegedly took place in December, 1953. The word "allegedly" is deliberate since there is some doubt whether such a trial ever took place except in the imagination of Soviet officials. Mr. Hogan's account of the trial and the Soviet laws on which it was based is necessarily incomplete. No transcript of the proceedings has been released by the Kremlin, and the testimony of the defendants and other witnesses remains unknown.

▪ One of the leading treason trials in modern times is alleged to have taken place in the Soviet Union in December, 1953. L. P. Beria, the head of the Soviet Ministry of Internal Affairs, and six high police officials were criminally indicted for having committed treason against the Soviet Union. The indictment was announced on December 17, and the trial was held before a special judicial commission of the Supreme Court of the U.S.S.R. from December 18 to 23. The defendants were found guilty as charged and were sentenced to death on December 23. They were executed on that same day.

A complete transcript of the record in this case has not been made public. The trial and the execution occurred over a year ago, yet the testimony of the defendants and of the witnesses has not been disclosed. Soviet legal journals have devoted little space to a discussion of the affair, and the notices in the state-controlled press have been limited mostly to a political commentary on the material contained in the indictment, the judgment and the sentence of the court. It is quite likely that the Soviets will never make public a full account of the proceedings in this case.

In the absence of a complete transcript of the record, therefore, it may be useful to construct a statement of the trial based upon the printed records of the indictment, the judgment and the sentence of the court, all of which were published in December, 1953, in the newspaper *Pravda,* the official organ of the Soviet government.

The Investigation and the Indictment. The preliminary steps leading to the indictment of Beria began with a report by the Council of Ministers charging him with "criminal activities . . . as an agent of foreign capital, directed toward the subversion" of the Soviet state.[1] The Presidium of the U.S.S.R. Supreme Soviet, as the result of this report, decreed that Beria be removed from his position as First Deputy Prime Minister of the Council of Ministers and from the post of U.S.S.R. Minister of Internal Affairs.[2] On August 8, 1953, the U.S.S.R. Supreme Soviet confirmed this decree and ordered Beria brought to trial.[3]

The U.S.S.R. Prosecutor's Office, in the meantime, began an investigation of the case, which resulted in a criminal indictment. On December 17 the Prosecutor's Office announced that:

> The investigation has established that Beria, using his position, collected a treacherous group of plotters hostile to the Soviet state, which made it its criminal aim to use organs of the Ministry of Internal Affairs, both in the center and locally, against the Communist Party and the Government of the U.S.S.R. in the interests of foreign capital, striving in their treacherous intents to place the Ministry of Internal Affairs above the Party and Government, to grab power and to liquidate the Soviet worker-peasant regime with a view to restoring capitalism and securing the revival of the domination of the bourgeoisie.[4]

Six high government officials were named as active participants in the plot, connected with Beria by "joint criminal activity". They were: V. N. Merkulov (Minister of State Con-

1. Report of the USSR Council of Ministers, cited in PRAVDA, December 17, 1953.
2. PRAVDA, July 10, 1953.
3. PRAVDA, August 8, 1953.
4. PRAVDA, December 17, 1953. Nove declares that this "document is legal only in the formal sense that it emerged from a legal office. It is a skilful piece of political writing, with nothing in its contents to suggest that it was in fact the work of any lawyer, great or otherwise." A. Nove, *The USSR After the Death of Stalin,* 6 SOVIET STUDIES 44 (July, 1954).

trol); V. G. Dekanozov (Minister of Internal Affairs of the Georgian S.S.R.); B. Z. Kobulov (Deputy Minister of Internal Affairs); S. A. Goglidze (Head of one of the administrations of the M.V.D.); P. Y. Meshik (Minister of Internal Affairs of the Ukrainian S.S.R.); and L. E. Vlodzimirsky (former Head of the Investigation Department, for particularly important matters, of the M.V.D.).

The indictment was drawn in four counts, three of which were common to all of the defendants, and one to Beria alone.[5] Beria was charged with high treason, organizing an anti-Soviet plot, committing acts of terrorism and active struggle against the working class and the revolutionary workers' movement, as a secret agent, during the period of the civil war (Articles 58-1 (B), 58-8, 58-13, and 58-11 of the R.S.F.S.R. Criminal Code). Merkulov, Dekanozov, Kobulov, Goglidze, Meshik, and Vlodzimirsky were charged with high treason, committing acts of terrorism, and participation in a counter-revolutionary treacherous group of plotters (Articles 58-1 (B), 58-8, and 58-11 of the R.S.F.S.R. Criminal Code).

Twenty-six Offenses . . . *The Charges Against Beria*

The indictment listed twenty-six offenses (counter-revolutionary crimes) allegedly committed by the defendants. Eleven of these were charged to Beria alone, and the others to Beria and the group jointly. Beria alone was charged with using M.V.D. organs for the seizure of power; pushing members of the plotters group into leading posts in the Ministry of Internal Affairs; interference with the collective farm system; secret agency duty in foreign intelligence services; protecting foreign spies from exposure and punishment; slander and intrigues against party and local government workers; conspiracy in Transcaucasia and Georgia; machinations designed to attain careerist aims; crimes of moral depravity; criminal mercenary actions; and other abuses of power.[6] The indictment announced that Beria "selected as his basic method *slander, intrigues* and *various provocations* against honest party and local government workers who stood in the path of his intents hostile to the Soviet state and who were an obstacle to him in his efforts to gain power".[7]

All of the defendants, including Beria, were charged jointly with persecution of workers of the M.V.D. who refused to carry out their plot; attempting to restore the remnants of bourgeois nationalist elements in the Union Republics; sowing hatred between the peoples of the U.S.S.R.; undermining the friendship of the peoples of the U.S.S.R. with the Great Russian people; seeking support for their plot from reactionary imperialist forces abroad; maintaining secret contacts with counter-revolutionary agents of foreign intelligence services; dealing unfairly with persons who did not suit them; committing acts of arbitrariness and lawlessness; deceiving the party and the state; waging a campaign of criminal intrigue against Sergo Ordzhonikdze; wreaking severe vengeance on the members of Ordzhonikdze's family; carrying out the terrorist murder of M. S. Kedrov; committing other terrorist murders with the object of exterminating cadres devoted to the party and the regime; committing acts designed to weaken the defensive capacity of the Soviet Union; and acting as agents of international imperialism.[8] The indictment announced that the defendants looked to support for their plot from "reactionary imperialist forces from abroad" and received no "social support" whatsoever from within the Soviet Union.[9]

Confronted by the testimony of "numerous witnesses" and by "true documentary data", all the defendants are alleged to have admitted their guilt. They were then committed to trial on the charges outlined above.

The Trial and Sentence. A special session of the Supreme Court of the U.S.S.R., consisting of eight members representing four divisions in the Soviet state system (the army, the party, the trade unions and the judiciary), was convened on December 18 to 23 to hear this case.[10] The chairman of the session was Marshal of the Soviet Union, I. S. Konev, and General of the Army K. S. Moskalenko was a member of the court. The party was represented by N. A. Mikhailov (Secretary of the Moscow Provincial Committee) and K. F. Lunev (First Deputy Minister of Internal Affairs); the trade unions by N. M. Shvernik (Chairman of the All-Union Central Council of Trade Unions) and M. I. Kushava (Chairman of the Council of Trade Unions of Georgia); and the judiciary by E. L. Zeiden (First Deputy Chairman of the Supreme Court of the U.S.S.R.) and L. A. Gromov (Chairman of the Moscow City Court).[11] The size and composition of the court distinguish this trial from the earlier Moscow treason trials of 1936,

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5. Pravda, December 17, 1953.
6. *Ibid.*
7. *Ibid.* ". . . the Moscow trials contained at the very least a proportion of invented 'facts,' and . . . many of the accusations made against Beria were nonsensical (and others, while possibly true, may also have been invented)." A. Nove, *The USSR After the Death of Stalin*, 6 Soviet Studies 42 (July, 1954).
8. Pravda, December 17, 1953.
9. *Ibid.*
10. Pravda, December 24, 1953.
11. *Ibid.*

1937 and 1938 which were conducted by three-member courts composed entirely of military jurists.[12]

The case was heard in a closed session, under the procedure dictated by the law of December 1, 1934.[13] This law, which is concerned with the investigation, indictment and trial of cases involving terrorist organizations and terrorist acts committed against the Soviet power, provides that (1) the investigation be concluded in a period of not more than ten days; (2) the indictment be presented to the accused twenty-four hours before the hearing of the case in court; (3) the accused be denied the benefit of counsel; and (4) the sentence of the court is final, and a petition for mercy is not allowed.[14] The sentence upon conviction is to be the highest measure of punishment—death—and is to be carried out immediately.

The Soviet newspaper *Pravda* announced on December 24 that the special judicial commission of the Supreme Court had "established the guilt of the accused L. P. Beria of high treason against his country; of organization of anti-Soviet conspiratorial groups in order to seize power and restore the rule of the bourgeoisie; of committing acts of terror against political leaders who were devoted to the Communist Party and the people of the Soviet Union; of waging an active fight against the revolutionary class movement in Baku in 1919, when Beria occupied the post of secret agent in the intelligence service of the counter-revolutionary Mussavat Government in Azerbaijan, and there established ties with foreign intelligence services up to the moment of his exposure and arrest. . . . The court established the guilt of the accused Merkulov, Dekanozov, Kobulov, Goglidze, Meshik and Vlodzimirsky of high treason, of committing terrorist acts and participating in an anti-Soviet traitors group. . . ."[15] The investigations conducted by the court during the trial were alleged to have completely confirmed the findings of the preliminary investigation and the accusations set forth in the indictment. The guilt of the defendants was said to have been "fully proved" by "documentary data, personal notes of the accused, and evidence of numerous witnesses". Confronted by such evidence, the defendants were alleged to have confirmed the testimony given by them at the preliminary investigation and again in court to have admitted themselves guilty of committing "a series of serious crimes against the state".[16]

All of the defendants were sentenced to the highest degree of criminal punishment (*i.e.*, to be shot), with confiscation of all personal property and removal of military titles and decorations.[17] Soviet newspapers, on Christmas Eve, 1953, carried the following terse announcement:

> Yesterday, the 23rd of December, the sentence of the special judicial commission of the Supreme Court of the U.S.S.R. as regards Beria, Merkulov, Dekanozov, Kobulov, Goglidze, Meshik and Vlodzimirsky, condemned to the highest degree of criminal punishment—shooting—was carried out.[18]

Analysis of the Charges

Counter-Revolutionary Crimes. There is a special category of crimes, in Soviet criminal law, known as *Gosudarstvennye (Kontrrevoliutsionnye) Prestupleniia*, or "State (Counter-revolutionary) Crimes". This category includes such crimes as:

a. Treason against the fatherland (*izmena rodine*),
b. Encroachment on the foreign security of the U.S.S.R. (*posiagaiushchie na vneshniuiu bezopashost' SSSR*),
c. Armed revolt (*vooruzhennyi miatezh*),
d. Terrorist acts (*terroristicheskii akt*),
e. Wrecking, diversionary acts, sabotage (*vreditel'stvo, diversionnyi akt, sabatazh*),
f. Counter-revolutionary propaganda and agitation (*kontrrevoliutsionnaia propaganda i agitatsiia*),
g. Active struggle against the revolutionary movement during the Tsarist period (*aktivnaia bor'ba s revoliutsionnym dvizheniem pri tsarskom stroe*),
h. Participation in counter-revolutionary organizations, and counter-revolutionary misprision (*uchastie v kontrrevoliutsionnykh organizatsiiakh i nedonesenie o kontrrevoliutsionnykh prestupleniiakh*).

The defendants in this case were charged with having committed crimes that fall within this category.

The Soviet concept of counter-revolutionary crime is defined in Article 58 of the Criminal Code which declares:

> Any action shall be deemed to be counter-revolutionary if it is directed towards the overthrow, undermining or weakening of the authority of the Worker's and Peasant's Soviets . . . or towards the undermining or weakening of the external security of the U.S.S.R., and the fundamental economic, political, and national conquests of the proletarian revolution.[19]

The origin of this concept and its relation to the "class struggle" in the Soviet Union has been summarized in a recent book on criminal law.[20] Political groups that have gained control of a state through overthrow of the existing regime have generally sought to dissociate themselves from the revolution. The Soviets, instead, have retained the title revolutionary government, and crimes against their regime are counter-revolutionary crimes. The objects of counter-revolutionary crimes are the authority of the Worker's and Peasant's Soviets; the external security of the U.S.S.R.; and the fundamental economic, political or national gains of the proletarian revolution. Any action directed towards the overthrow, undermining or weakening of these objects is a criminal offense punishable as a counter-revolutionary crime. This includes the preparation or the possession of literature with such a content.[21]

12. *Cf.* note 57 below.
13. SZ, USSR, 1934, No. 64, Article 459.
14. *Ibid.*
15. Pravda, December 24, 1953.
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. UK, RSFSR, 1926 (as amend.), Article 58.
20. *Sovetskoe uglovnoe pravo* (Gosiurizdat, Moscow, 1951), pages 30-66. *Cf.* 12 *Bolshaia Sovetskaia Entsiklopediia* 307-308 (Moscow, 1952).
21. UK, RSFSR, 1926 (as amend.), Article 58-10.

Treason to the Fatherland. Described in the Soviet Constitution as the "most heinous of crimes", treason is expressly defined as "violation of the oath of allegiance, desertion to the enemy, impairing the military power of the state, espionage. . . ."[22] The punishment for treason is to be "with all severity of the law". The principal charge against the defendants in this case was that of having committed acts of treason to the fatherland.

Ten Years or Death . . . *The Penalty for Treason*

Article 58-1 (A) of the Soviet Criminal Code also defines treason and provides the penalty:

> Treason to the fatherland, *i.e.*, of agency, committed by citizens of the U.S.S.R. to the prejudice of the military power of the U.S.S.R., its sovereign independence or the inviolability of its territory, like that of: espionage, betrayal of military or state secrets, hasty retreat or flight across the border, is punishable by the highest measure of criminal punishment,—by shooting with confiscation of all property; but in the presence of mitigating circumstances—by the deprivation of freedom for a term of ten years with confiscation of all property.[23]

Treason involves the commission of certain acts which prejudice the military power of the U.S.S.R., its state independence or its territorial inviolability. Three such acts are expressly enumerated: espionage, disclosure of state or military secrets and desertion to the enemy. All of these—except desertion to the enemy —were charged in this case. It will be recalled, however, that flight abroad was at one time rumored in the press in the case of one of the defendants, namely Beria.[24]

The penalty for treason is generally shooting. Under extenuating circumstances, however, when the indictment is drawn under Article 58-1 (A) of the Criminal Code, the penalty may be reduced to imprisonment for a term of years with loss of property.[25] Thus in the earlier Moscow trials, clemency was allowed in the case of five[26] of the defendants: in the 1938 trial, Pletnev, Rakovsky and Bessonov received lesser sentences involving prison terms; and in the 1937 trial, Radek and Sokolnikov received ten-year prison sentences.[27]

The Beria group, however, were not indicted under Article 58-1 (A) of the Criminal Code. Instead, this indictment was drawn under Article 58-1 (B), which provides:

> These same crimes, committed by military men, are punished by the highest measure of punishment—shooting with confiscation of all property.[28]

There is no provision for clemency in the case of a conviction under this section of the Criminal Code.

Terrorist Acts. The defendants were also charged with having committed a number of terrorist acts. Article 58-8 of the Criminal Code

> prohibits the performance of terrorist acts, directed against the Soviet authority or the activities of the revolutionary workers and peasants organizations, and the participation in the execution of such acts, even should the persons not belong to counter-revolutionary organizations.[29]

A recent Soviet manual on criminal law cites as examples of terrorist acts three events in Soviet political history: the murder of S. N. Kriova in December, 1934, and the preparations for the commission of acts against the party leaders and the government which were disclosed at the trial of the "Trotskyite-Zinoviev Centre" in 1937 and at the trial of the "Anti-Soviet Bloc of Trotskyites" in 1938.[30] Future editions of this manual can be expected to refer to the activities of Beria in this connection.

The indictment charged Beria and the other defendants with having carried out "terrorist murders of persons" from whom they feared exposure.[31] Specifically, they were accused of having put to death M. S. Kedrov, because they suspected that he had at his disposal certain information concerning the criminal past of Beria. In a sweeping charge, the indictment announced that "other facts relating to the terrorist murders committed by the plotters, with the criminal intent of exterminating honest cadres that are devoted to the cause of the Communist Party and the Soviet regime, have also been established".[32] The judgment of the court is conspicuous for its lack of a reference to the murder of Kedrov, and its restricted statement of the terrorist acts proved against the defendants. It is limited to a statement that "the accused L. P. Beria and his accomplices committed terrorist acts against the people whom they feared would expose them".[33]

The transcript of the proceedings at the 1936 Moscow trial discloses how a terrorist group operates. Instructions had been received "to proceed to action" in preparing an attempt on the life of Voroshilov. Defendant N. Lurye testified in court as follows:

President of the Court: When you were engaged in preparing the attempt on the life of Comrade

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22. *Constitution of the Union of Socialist Republics* (OGIZ, Moscow, 1938), Article 133.
23. UK, RSFSR, 1926 (as amend.), Article 58-1 (A). *Cf.* SZ, USSR, 1934, No. 33, Article 255.
24. On September 20, 1953 the *New York Times* reported that Senator McCarthy's subcommittee was investigating a report that Beria had escaped from the U.S.S.R. and was hiding in a neutral country. The *San Diego Morning Union* claimed to have learned that Beria and three aides had escaped and were willing to exchange Soviet state secrets for asylum in the United States. The CIA began a probe of these reports. On September 21, the *New York Times* reported that a Senate subcommittee representative had contacted a man representing himself to be Beria, but that this man refused to talk to anyone but Senator McCarthy or Vice President Nixon. On the following day, McCarthy declared that neither he nor any member of the subcommittee had had direct contact with this man. Senator McCarthy later declared that the escape story was a hoax, and that the "supposed" Beria was then in Spain. (*New York Times*, September 29, 1953.)
25. UK, RSFSR, 1926 (as amend.), Article 58-1 (A).
26. Arnold and Strollov, who also received lesser sentences, were not convicted under this section of the Criminal Code.
27. *Cf.* Case of the Anti-Soviet "Bloc of Rights and Trotskyites" (People's Commissariat of Justice, USSR, 1938) pages 779-780; and Case of the Anti-Soviet Trotskyite Centre (People's Commissariat of Justice, USSR, 1937) page 579.
28. UK, RSFSR, 1926 (as amend.), Article 58-1 (B).
29. UK, RSFSR, 1926 (as amend.), Article 58-8.
30. *Sovetskoe ugolovnoe pravo* (Gosiurizdat, Moscow, 1951), page 83.
31. Pravda, December 17, 1953.
32. *Ibid.*
33. Pravda, December 24, 1953.

Voroshilov you for a long time watched the coming and going of Comrade Voroshilov's automobile? How long were you engaged in preparing for the attempt on the life of Comrade Voroshilov?

N. Lurye: We were engaged in it from September, 1932, until the spring of 1933.

President of the Court: . . . you frequently went to Frunze Street armed with revolvers? . . . You would have committed the terrorist act had a favorable moment offered itself? Why did you not succeed in doing so?

N. Lurye: We saw Voroshilov's car going down Frunze Street. It was travelling too fast. It was hopeless firing at the fast running car. We decided that it was useless.

President of the Court: You managed to see Comrade Voroshilov's car?

N. Lurye: I saw it and so did the second member of the group, Paul Lipschitz.

President of the Court: Did you cease watching Comrade Voroshilov's car?

N. Lurye: Yes.

President of the Court: For what reasons?

N. Lurye: Because we became convinced that it was useless shooting with a revolver.

President of the Court: What did you turn your attention to after that?

N. Lurye: To the acquisition of explosives.

President of the Court: What kind of terrorist act did you intend to commit?

N. Lurye: A terrorist act with a bomb.

President of the Court: . . . against whom?

N. Lurye: Against Voroshilov.[34]

At this same trial, Prosecutor Vyshinsky described the preparation and commission of a terrorist act:

> The underground machinery begins to work, knives are sharpened, revolvers are loaded, bombs are charged, false documents are . . . fabricated, secret connections are established with the German political police, people are sent to their posts, they engage in revolver practice, and finally they shoot and kill. That is the main thing! The counter-revolutionaries not only dream of terrorism, they not only devise plans for a terrorist plot or for terroristic attempts, they not only prepare to commit these foul crimes, they commit them, they shoot and kill. The main thing in this trial is that they transform their counter-revolutionary thoughts into counter-revolutionary deeds, their counter-revolutionary theory into counter-revolutionary practice, they not only talk about shooting, they shoot, shoot and kill! That is the main thing. They killed Comrade Kirov, they were getting ready to kill Comrade Stalin, Voroshilov, Kaganovich, Ordzhonikidze, Zhdanov, Kissior and Postyshev.[35]

The transcript of the proceedings of the 1937 trial contains a reference to a plot to commit a terrorist act against Beria himself in 1934. The following is a discourse which took place between Prosecutor Vyshinsky and defendant Serebryakov:

Serebryakov: The question of committing a terrorist act against Beria was raised, but Pyatakov and I advised them [Mdivani and others] not to do it. We argued that a terrorist act against Beria might interfere with the terrorist act against Stalin. We proposed that, if the forces were available, they should prepare a terrorist act against Stalin, while continuing with their preparations for a terrorist act against Beria.

Vyshinsky: While continuing?

Serebryakov: While continuing. We advised them in every way not to commit the act against Beria before the terrorist act against Stalin had been committed.

* * *

Vyshinsky: And what about the attempt on the life of Comrade Beria?

Serebryakov: It was not abandoned, nor were the preparations abandoned; it was suspended.

Vyshinsky: In order to co-ordinate the operations?

Serebryakov: Yes.

* * *

Vyshinsky: This was in 1934?

Serebryakov: In 1934. . . .[36]

Participation in Counter-Revolutionary Organizations. Article 126 of the Soviet Constitution ensures to citizens of the U.S.S.R. the right to "unite in public organizations". Specifically, this includes the right to unite in

> trade unions, cooperative associations, youth organizations, sport and defense organizations, cultural, technical and scientific societies. . . .[37]

It is provided that "the most active and politically most conscious citizens . . . unite in the Communist Party of the Soviet Union (Bolsheviks), which is . . . the leading core of all organizations of the working people, both public and state."[38]

The participation in counter-revolutionary organizations, however, is prohibited by Article 58-11 of the Soviet Criminal Code which makes it a criminal offense to organize, supervise or to participate in such an organization.[39] The indictment alleged that Beria, in violation of this article of the Code, had "collected a treacherous group of plotters hostile to the Soviet state", and that the other defendants had been "active participants" in this group.[40] The judgment announced that Beria had been found guilty of the "organization of anti-Soviet conspiratorial groups" and the other defendants of "participating in an anti-Soviet traitors group".[41]

In this connection, the indictment charged that the defendants were connected with Beria by "joint criminal activity". The Soviet concept of complicity in counter-revolutionary activities and organizations is broad. It is said that "the actual nexus between any given crime and any given

(Continued on page 477)

34. Case of the Trotskyite-Zinovievite Terrorist Centre (People's Commissariat of Justice, USSR, 1936) pages 103-105.
35. *Ibid.*, pages 129-130.
36. Case of the Anti-Soviet Trotskyite Centre (People's Commissariat of Justice, USSR, 1937), page 170.
37. *Constitution of the Union of Soviet Socialist Republics* (OGIZ, Moscow, 1938), Article 126.
38. *Ibid.*
39. UK, RSFSR, 1926 (as amend.), Article 58-11.
40. Pravda, December 17, 1953.
41. Pravda, December 24, 1953.

The Writ of Habeas Corpus:

The Most Celebrated Writ in the English Law

by **Robert G. Simmons** • ***Chief Justice of the Supreme Court of Nebraska***

■ **Blackstone called it "the most celebrated writ in the English law"; Holdsworth referred to it as "the most effective weapon yet devised for the protection of the liberty of the subject"; and the privilege of the writ of habeas corpus was so precious to the Founding Fathers that they incorporated in the Constitution a guaranty that it should be suspended only in times of the gravest national emergency. Chief Justice Simmons traces the origins of the great writ back into the mists of antiquity.**

■ "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it."

This provision in Article 1, Section 9 of the Constitution of the United States suggests three questions: With what right is the writ concerned? What was the scope of the writ when this provision was written? What means had been provided to make effective the right protected by the writ?

It is the purpose of this paper to inquire into and to state in broad outline the answers to these questions as of the time of the adoption of our Constitution. Woven through this entire discussion will be found the answer to the question as to why the privilege of the writ was deemed of sufficient importance to incorporate it in our basic law.

What was the right?

For the answer to that question we turn to Blackstone's *Commentaries* and to the first chapter of the first book dealing with the rights of persons, and more specifically personal rights. They deal with those rights denominated the "natural liberty of mankind"[1] limited by those rights which man gives up when he enters into society and "which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint".[2]

It is to be remembered also that to Blackstone at his time "the English is the only nation in the world where political or civil liberty is the direct end of its constitution".[3]

Blackstone divides personal rights into three "principal articles"—"the right of personal security, the right of personal liberty and the right of private property, because, as there is no other known method of compulsion or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense".[4]

This analysis suggests the possible, if not probable, source of that provision in Article V of the Bill of Rights of our Constitution which provides that "no person shall . . . be deprived of life, liberty or property, without due process of law". Blackstone states that next to personal security the personal liberty of the individual is preserved by the law of England; that it "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law". This suggests to us our "due process of law". He further holds that personal liberty is a "right strictly natural"[5], never to be abridged without sufficient cause and without explicit permission of the law.

Again he states: "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities".[6]

"To bereave a man of life, or by

1. 1 Blackstone, COMMENTARIES *125.
2. 1 Blackstone, COMMENTARIES *126.
3. 1 Blackstone, COMMENTARIES *145.
4. 1 Blackstone, COMMENTARIES *129.
5. 1 Blackstone, COMMENTARIES *134.
6. 1 Blackstone, COMMENTARIES *135.

violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing . . ."[7]

It is with that liberty that the writ of habeas corpus is concerned.

The Great Writ . . . *Its Ancient Origins*

What then is the scope of the writ which Blackstone says is "the most celebrated writ in the English law"?[8] It is to be noted that he uses the singular "writ". It is to be remembered also that he was writing as of the time when the English law on the subject had been well developed.

The scholars of the subject all seem to agree that the origin of the writ is lost in antiquity. Throughout the centuries, the ordinary writs were ineffective against unlawful imprisonment. A number of writs were devised and ultimately largely cast aside or perhaps more properly became obsolete as the "great writ"[9] of Blackstone's time became effective.

Possibly we should refer here to that provision of the Magna Charta, granted by King John in 1215, which provides: "No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condem him, nor will we convict him to prison, excepting by the legal judgment of his peers, or by the laws of the land".[10]

Here was a promise, a principle that was to be made effective in the centuries that followed in part by various writs that were developed and in part strengthened and assured by legislative enactment and judicial decrees.

Of the old writs, three are mentioned in the books. The writ *"de homine replegiando"* was in essence one in replevin to secure the release on bail of a person imprisoned for a bailable offense. It could be made effective by the rather sure method of holding the custodian if he refused to produce the prisoner whom it was his duty to release. It was ineffective so far as unlawful imprisonment at the order of the crown was concerned for it made one so held an exception to the writ.

The writ of *mainprise* seems also to have been devised to enlarge prisoners indicted for a felony by surety for their appearance.

The writ *de odio et atia* was for the benefit of a person accused of homicide by a private person. It directed that it be determined by inquiry whether or not the accused was held for good reason (our probable cause) or for the "hatred and ill will" of his accuser. If the latter then the accused was ordered admitted to bail.

These writs were truly ancient and for various reasons became ineffective and fell into disuse, but the need for a writ to protect from unlawful imprisonment continued, and became acute in the climax period of the contest between the Crown and the Parliament, wherein the Crown undertook to use and did use the power of imprisonment without cause or lawful authority as a political weapon.

Other writs of ancient origin should be mentioned. There were writs that were "habeas corpus" writs which in effect authorized arrest on mesne process; writs used for the purpose of removing prisoners from one court to another for the easier administration of justice; writs designed to protect the "privilege" from legal process; writs designed to protect and probably enlarge the jurisdiction of the common law courts. We need not now inquire as to whether or not these writs accomplished the particular purpose for which they were designed.

A study of these writs, so far as descriptions of them in our books permit, discloses that they had one common underlying purpose. That purpose was to bring a man before a court that he might there be dealt with according to the due course of the law.

These various writs were not effective when called upon to inquire into the legality of imprisonment made by order of the Crown or its council and without cause or for political reasons. The right of habeas corpus against the Crown's arbitrary action was challenged and effectively denied. The judges were either unable or unwilling to extend the application of the writ, or perchance to enforce it when the Crown ruled otherwise. There was also, at that time, a sentiment in Parliament that the devising of new writs was a legislative and not a judicial matter.

Parliament undertook to remedy the situation. By the Petition of Right passed in 1628, that body cited the Crown to the provision of Magna Charta above quoted and to a provision of an act passed in the reign of Edward III that no man should be imprisoned without due process of law. It was charged that men were being imprisoned by Crown or council command and denied the benefits of habeas corpus and further imprisoned "without being charged with anything to which they might make answer according to law".

The Crown asserted a right and subsequently found ways to avoid the purpose of the act and to continue the arbitrary action of the Crown and its council.

This was followed by the Act of Parliament of 1640 which dissolved

7. 1 Blackstone, COMMENTARIES *136.
8. 3 Blackstone, COMMENTARIES *129.
9. 3 Blackstone, COMMENTARIES *130-131.
10. Barrington, MAGNA CHARTA (2d ed.) 239

the Court of the Star Chamber and provided for use of the writ of habeas corpus so that a person who holds another in custody was required to show cause and a determination had of whether or not the commitment was just and legal and to deliver, bail or remand the prisoner according to law.

But the Crown found ways to delay or avoid or ignore this law. Oppressions followed. Parliament passed the Habeas Corpus Act in 1679. Blackstone classes it along with Magna Charta and the Bill of Rights as one of the great charters of English liberty and refers to it as "that great and important statute".

Holdsworth in 9 *History of English Law*, page 118, says:

> This Act made the writ of *Habeas Corpus ad subjiciendum* the most effective weapon yet devised for the protection of the liberty of the subject, by providing both for a speedy judicial inquiry into the justice of any imprisonment on a criminal charge, and for a speedy trial of prisoners remanded to await trial. It seems to have made the *Habeas Corpus ad subjiciendum* the only form of the writ used for the purpose of protecting liberty; for we shall see that when, in the eighteenth century, it was desired to make still ampler provision for its protection, this object was achieved by an extension of this form of the writ as improved by this Act. The following summary of the provisions of the Act will illustrate the defects in the writ which the experience of the past nineteen years had disclosed, and will indicate the manner in which they were successfully remedied:—The lord chancellor and any of the judges of the superior courts must issue the writ in vacation or in term, unless the prisoner is committed for treason or felony plainly expressed in the warrant of commitment, or is in prison on conviction for crime, or by some legal process. The time is specified within which the return of the writ must be made, and within which the court or judge must adjudicate on the writ. Gaolors must deliver to prisoners a true copy of the warrant of commitment. No persons released by writ of *Habeas Corpus* may be again committed for the same offence. Prisoners indicted for treason or felony must be tried at the next sessions or bailed; but if it appear that the king's witnesses cannot be ready at that time, they may be committed till the following term; if not tried, then they must be discharged. No persons are allowed to alter a prisoner's place of confinement, except in certain specific cases defined by the Act. No prisoners may be sent to Scotland, Ireland, or parts beyond the seas. The writ is to run into the counties palatine and all other privileged places.

Evasions of the Writ . . . *Requiring Excessive Bail*

The writ there authorized became the principal form of the writ used for the purpose of protecting liberty. The King desired to secure its repeal as an act destructive of royal authority. His judges undertook to require excessive bail, and thus evade it. That requirement led to the provision in the English Bill of Rights "that excessive bail was not to be required". This suggests the source of the Eighth Amendment to our Constitution regarding bail.

A scholar summarizing this act wrote:

> We must admire, as the keystone of civil liberty, the statute which forces the secrets of every prison to be revealed, the cause of every commitment to be declared, and the person of the accused to be produced, that he may claim his enlargement, or his trial within a limited time. No wiser form was ever opposed to the abuses of power. But it requires a fabric no less than the whole political constitution of Great Britain, a spirit no less than the refractory and turbulent zeal of this fortunate people, to secure its effects.[11]

Such then was the writ of *habeas corpus* which our founding fathers knew when they wrote our constitutional provision.

But the existence and recognition of the right of personal liberty and the centuries of effort resulting finally in the Habeas Corpus Act did not in and of themselves insure liberty. The right and the remedy alone were not sufficient.

The final question comes as to what means were provided to make that right and that remedy effective in fact.

The answer is found in a brief summary of the development of the courts of England into an independent judiciary, as it was to those courts that the people of England looked, as we do, to make effective the preservation of their liberties. Their difficulties in the earlier years of this controversy came in part because of the status of judges and courts in the English system, and finally found fruition in courts that had the power to enforce effectively those rights.

The judicial system of England developed along with its law. It produced great judges selected from the leaders of the Bar, men learned in the law and in its philosophies, who built its foundations firm and broad. But the judge was regarded by the sovereign as his mouthpiece, his duty to express and carry out the royal will and decree. The King having the power to appoint and remove judges claimed the right to control their decisions. This disposition of the sovereign became pronounced in the years preceding the passage of the Habeas Corpus Act. That notion of the place of the judge weaves through the great liberty se-

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11. Hurd, Writ of Habeas Corpus (2d ed.) 87.

curing controversies of that time. Mistake not—there were judges of high place who refused to desert justice and government by law at the King's command. Many of them paid for their independence by loss of position—and more. But as to others, judgeships were bought and sold, judges frankly admitted that they gave judgment by order of the King, whom they dared not disobey; judges were expected to be subservient to the crown and secured appointment only by pledging themselves to carry out the royal will.

England faced the issue of an independent judiciary, not for the advantage of judges or lawyers, but for the benefit of people and the protection of their rights and liberties under law. Parliament acted to solve that problem also.

By the statute of 13 Wm. c. 2 in 1700, it was enacted that judicial commissions should be made to run so long as the judges conducted themselves uprightly but subject to removal by parliament. The statute was titled "An act for the further limitation of the crown and better securing the rights and liberties of the subject". This obviously put an end to the former practice of the King of removing judges at pleasure. Later by the statute of 1 Geo. III, c. 23, enacted in 1760, it was provided that judges were to continue in office during good behavior, notwithstanding a change of sovereigns by death, and that their salaries should not be reduced during the period of their service. The King declared that "he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown." This suggests the source of Section 1, Article 3 of our Constitution.

And so it came about that the people of England, recognizing and claiming the fundamental right of personal liberty, created the writ of habeas corpus as a tool by which independent judges made their liberty effective. Full credit goes to judges and to the lawyers who supported them in the centuries' long struggle. But in the end, credit goes to the liberty-loving people who had the will and who acted to make this freedom, not a right alone but a fact.

ASSOCIATION CALENDAR

REGIONAL MEETINGS

Cincinnati, Ohio	June 8-11, 1955
St. Paul-Minneapolis, Minnesota	October 12-15, 1955
New Orleans, Louisiana	November 27-30, 1955
Hartford, Connecticut	April 15-18, 1956

States Included

CINCINNATI (Big Seven Regional Meeting)—Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee and West Virginia (Grauman Marks, General Chairman, St. Paul Building, Cincinnati 2)

ST. PAUL-MINNEAPOLIS (Northwestern Regional Meeting)—Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wisconsin (W. W. Gibson, Honorary Chairman, Roanoke Building, Minneapolis 2; Ivan Bowen, Co-Chairman, Rand Tower, Minneapolis 2; John B. Burke, Co-Chairman, Minnesota Federal Building, St. Paul 1) *(Headquarters, St. Paul)*

NEW ORLEANS (Deep South Regional Meeting)—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee and Texas (Cuthbert S. Baldwin, General Chairman, Richards Building, New Orleans, 12; P. A. Bienvenu, Chairman of Registration and Hotel Accommodations, American Bank Building, New Orleans 12)

HARTFORD (Northeastern Regional Meeting)—Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont (Cyril Coleman, General Chairman, 750 Main Street, Hartford 3)

(For information and reservations, write to the chairmen listed above)

BOARD OF GOVERNORS MEETING

Mayflower Hotel, Washington, D.C. May 16 and 17, 1955

ANNUAL MEETINGS

Philadelphia, Pennsylvania August 22-26, 1955
(Bellevue-Stratford — Headquarters)

Dallas, Texas August 27-31, 1956

Free Lawyers and Cold War:

The International Commission of Jurists

by **Tom Killefer** · *of the California and District of Columbia Bars*

■ **This is the story of an organization of lawyers formed to fight the Communist disregard of the principles of law which are the basis of Western society. The success of the organization is perhaps best demonstrated by the reaction of the Communists themselves, who have branded the members of the organization "traitors" and "gangsters".**

■ What is the legal profession in the countries of the free world doing to strengthen belief in a judicial process based upon equal justice under the law?

What effort are American lawyers making to preserve the spark of freedom and to encourage fellow lawyers of nations within the Communist orbit?

The International Commission of Jurists at The Hague offers an answer to these questions—questions which deserve the attention of American lawyers, both because little is known of current efforts of the legal profession to reaffirm faith in the force of justice as we know it and because until only recently the organized Bar in the United States had shown little active interest in the problem of rights of the individual behind the Iron Curtain.

"We owe them our deep gratitude and our deeper admiration." Judge Learned Hand in these words concluded his observations on the occasion of a recent meeting of New York lawyers which enthusiastically endorsed the work of the International Commission of Jurists, an organization of leading judges, lawyers and law professors whose primary purpose is to gather evidence and publish documented reports throughout the world of systematic Communist injustice behind the Iron Curtain.

To understand the growth and tremendous force of the crusade against injustice as a system in countries under Communist domination, it is necessary to go back three and a half years to West Berlin, over a hundred miles behind the Iron Curtain. There under postwar joint four-power administration the city was divided into four sectors, although its citizens continued to move freely between the eastern and western sectors by subway and elevated transportation systems, even when important streets running across the sectors had been barricaded by the Soviets. There under the leadership of Dr. Theo Friedenau, a prominent refugee lawyer from East Germany who had given up a successful practice to fight against Communist maladministration of justice, a group was organized consisting of some forty lawyers who had found it impossible to endure life under the Communist People's Democracy of East Germany. They called themselves the Investigating Committee of Freedom-Minded Lawyers of the Soviet Zone.

Taking advantage of the position of West Berlin as an outpost of the Western world—a free island in a Red sea of Communism—and the unique possibilities of east-west communication offered in divided Berlin, the Investigating Committee set itself the task of exposing the systematic elimination of freedoms of the individual then in process under the Communist East Germany regime, assisted by the tanks of the Russian army. These freedoms were then guaranteed by the law of East Germany as they are by our own Bill of Rights and the Constitution of the United States, but they were being denied with increasing regularity.

In the next two years the Investigating Committee enlisted the aid of more than two thousand persons in East Germany, lawyers and others from every walk of life, who held the same beliefs as they and who were willing to accept the risk of reporting violations of law and injustices in their own communities.

The Investigating Committee painstakingly gathered documentary evidence and reports of forced labor, arbitrary expropriation of property,

inhuman punishment for political crimes and denial of legal redress for wrongs committed under existing laws. Its aim was to fight not against political beliefs but against political crimes. It attacked an offending Communist official not because he was a Communist, but because he had committed a crime under the East German law of his own regime.

When sufficient evidence had been obtained and verified in a particular case an indictment was drafted by the Investigating Committee and filed with the Ministry of Justice in West Germany, for prosecution whenever it should become possible to apprehend the offender and bring him before the bar of justice. Such indictments, complete except for the seal of an issuing court, were distributed widely by secret hand-to-hand circulation in the Soviet Zone and were broadcast over R.I.A.S., the free Berlin radio station. While ineffectual as an immediate force for law and order, the indictments were feared by and had definite deterrent effect upon Communist officialdom. Party functionaries knew they might one day fall from grace and become subject to purge. If this were to happen they recognized that it would be better to seek refuge in the "imperialist" West than to be seized by the State Security Police. Thus they kept one eye on the West and sought to avoid increasing their criminal record. The files of the Investigating Committee provided an authentic legal register on such miscreants and many criminal refugees have been convicted of crimes in West Berlin or West German Courts on the basis of evidence procured by the Investigating Committee.

The Committee has counselled personally over one hundred thousand East Germans who have come to it for advice. For those who are unable to get to Berlin regular radio broadcasts outline instructions on such subjects as what to do in case of political arrest or illegal assessment of taxes or compulsory engagement as an informer. Advice is given as to laws and regulations newly promulgated. Emphasis is laid on the avoidance of personal risk in dealing with the authorities.

After two years of documenting specific cases of injustice, the Investigating Committee determined to place its findings before legal authorities throughout the free world and to that end an International Congress of Jurists was convoked in Berlin in July of 1952. Attended by nearly 150 distinguished representatives of the legal profession from forty-two countries, the Congress included leading lawyers and judges from as far away as Korea, Pakistan, Brazil, Thailand, Iran and Iceland. Refugee lawyers from the Soviet satellite nations behind the Iron Curtain attended from Rumania, Albania, Bulgaria, Czechoslovakia, China, Russia and Poland.

The Communist press in Berlin immediately responded with a vigorous attack against the Congress denouncing the Investigating Committee as traitors and the delegates from Western nations as "gangsters". Representatives from the United States included in the Communist denunciation were Robert G. Storey, of Dallas, soon after elected President of the American Bar Association, George Maurice Morris, of Washington, a past Association President, Dudley B. Bonsal, of the New York Bar, and Professor Paul R. Hayes, of Columbia University.

The Communist Reaction . . . *The Kidnapping of Dr. Linse*

The celebrated Linse kidnapping case was another manifestation of Communist reaction to the Congress. Dr. Linse was a former manager of the East Germany Chamber of Industry and Commerce in Chemnitz. Becoming disillusioned with the Communist regime he moved to West Berlin and participated in the work of the Investigating Committee. A few days before the Congress convened, while on his way to work Dr. Linse was physically overpowered by three unidentified men in front of his house and in the sight of his wife. Forced into a waiting taxi equipped with illegally obtained West Berlin license plates, he was carried off across the Soviet Sector line. A pursuing police radio car and civilians attracted by Dr. Linse's cries for help were fired upon by the kidnappers in order to hinder pursuit. Nothing has been heard from or about Dr. Linse since that date, despite the immediate intercession and official protests made by our then High Commissioner for Germany, Walter Donnelly, to the Russian Commander, General Chuikov.

The Congress heard testimony from witnesses who had come from East Germany to appear before it. It examined documentary material from the files of the Investigating Committee. The delegates separated themselves into four commissions, on penal law, public law, civil and economic law and labor law, and made detailed studies of these respective fields as administered by the authorities in East Germany. Documented cases of injustice presented by the Investigating Committee were collected under appropriate sections of the United Nations Declaration of Human Rights, a declaration to which the Soviets at least formally still adhere. The four panels examined witnesses and reviewed voluminous evidence from hundreds of cases. The materials presented included affidavits, depositions of witnesses, Soviet Zone criminal justice statistics, indictments, sentences and decisions of the Supreme Court of the People's Democracy, all from the Communists' own files. The panels unanimously concluded that the Communist authorities in East Germany were deliberately and systematically destroying human rights guaranteed by their own laws, and taken for granted by most of us in the United States.

They learned that the judiciary in East Germany has been singled out as a primary target for destruction. John J. McCloy, formerly United States High Commissioner for Germany, reported after he returned to this country that the mass deportations, kidnappings, executions,

forced labor and political trials of Communist regimes when publicized in the Western nations appeared to have forced the Soviet nations into an effort to rationalize the theory upon which such things had been done. In recent months prominent Communist legal authorities have restated the bases upon which "justice" is administered in countries under Communist rule. They have enunciated a new concept—the unity of state powers—which includes administration of justice. This doctrine repudiates entirely the "bourgeois" western concept of separation of powers. The division of executive, legislative and judicial functions upon which the Constitution of the United States was founded has been abolished. There is no independence of the judiciary. The will of the State is substituted in its place and the Judge functions only as an interpreter of the requirements of the State as dictated by current political expediency.

Thus for an individual to protest his innocence of any charge or to attempt to demonstrate he has not violated the law in itself is sufficient to constitute contempt. Attorneys have frequently been arrested in the course of their work in the courtroom or are intimidated and threatened against defending persons charged with political crimes. More and more lawyers are refusing to act as defense counsel in criminal proceedings. The gravity of a criminal act and the measure of punishment are determined by the extent to which the crime affects the state. Stealing the bicycle of an individual is punishable by a small fine or short sentence. The same offense committed against a people's enterprise—"a case of aggravated circumstances"—may result in a sentence of from ten to twenty-five years penal servitude.

Delegates to the Congress learned that 72 per cent of the judges in the Eastern Zone of Germany are "People's Judges" whose legal background and experience may consist of no more than from six months to two years of indoctrination courses in Communist theory and practice. Only 3 per cent of the public prosecutors have had legal training. A judge's tenure runs only so long as his decisions are consonant with objectives of the state. He can be removed summarily if the result in a particular cause does not please the party functionaries. By 1952 at least 1718 judges, prosecutors and court officials had escaped as refugees to the West from Eastern Germany.

On the basis of evidence introduced during the course of the proceedings, each of the four Commissions of the Berlin Congress found the allegations of injustice to be thoroughly substantiated. The Commissions then reported their findings back to the Congress, which drew up and unanimously adopted resolutions endorsing the four reports. Recently a compilation of the findings was published by the Federal Ministry for All-German Affairs of the Bonn Government, under the title "Injustice as a System". The delegates were so enthusiastically impressed with the necessity of extending the work of the Investigating Committee to other Iron Curtain countries that they determined to take steps to broaden the base of its efforts to include investigation on an international level. For this purpose before adjournment they appointed a standing committee to be headquartered at The Hague, and empowered to complete the findings of the Congress pending formation of a permanent International Commission of Jurists.

The high caliber of the leadership and standard of competence attracted by the Congress is indicated by the membership of this Standing Committee. Its Chairman is H. T. Thorson, President of the Court of Exchequer of Canada. The other members are P. Federspiel, former Minister of Justice of Denmark and Danish Delegate to the United Nations; Dr. José T. Nabuco, leader of the Brazilian Bar; H. B. Tyabji, former President of the Supreme Court of Pakistan; Dr. E. Zellweger, former Minister of Switzerland in Yugoslavia and Professor of International Law of the University of Zurich; and Dr. A. J. M. Van Dal, a leading advocate before the Supreme Court of The Netherlands.

Tom Killefer practices in Washington, D. C. He received his A.B. from Stanford in 1938, his LL.B. from Harvard in 1942 and a B.C.L. from Oxford University, where he was a Rhodes scholar, in 1947.

A resolution passed by the Congress authorized the Standing Committee to co-opt additional members, and the organization has now expanded into a governing board with members scattered throughout the free countries of both hemispheres and an Executive Committee of five located at The Hague to carry out the active direction of its work. Small offices have been opened in Munich and Istanbul for the gathering and collation of documents and reports of refugees.

The program envisaged by the International Commission of Jurists provides for research and for the gathering and presentation in orderly fashion of case histories and supporting documents under the direction of individual consultants from each of the satellite nations and assisted wherever possible by Dr. Friedenau's Investigating Committee. Interviews with individual escapees are to be supplemented and corroborated by collected published material, much of which is still available from the Iron Curtain countries. The Li-

brary of Congress in Washington has for some years compiled annotations of the statutes of nations within the Communist orbit, and this material should prove to be an invaluable source of information.

Completed studies are to be reviewed by impartial specialists from the Commission in the field involved, and verified findings given wide publication among lawyers, law schools, bar associations and other legal or interested non-legal organizations. Some consultative status with the United Nations Legal Committee and the Committee on Human Rights is planned.

The Commission's Purpose . . . *To Defend the Rule of Law*

The organization from time to time may direct its attention to studies of Communist show trials with the idea of opening the record and the circumstances behind the record to public scrutiny. Facts will be published to provide the people of the satellite nations as well as the free world with a fair basis for deciding, without bias, legal issues of public interest made the subject of Communist propaganda, such as the *Rosenberg* case. Activities of subversive organizations in the legal field will be observed and documented for later appropriate disposition. The program is designed to carry out the prime purpose of the International Commission—to defend preservation of justice under the rule of law.

Upon their return to the United States the American delegates to the Berlin Congress lost no time in advising their colleagues of their interest and enthusiasm in the continuation of the work and the formation of the International Commission of Jurists. Robert G. Storey in the "President's Page" of the AMERICAN BAR ASSOCIATION JOURNAL for October, 1952, called to the attention of the Association the importance of supporting efforts to expose the injustice of the Soviet-dominated judicial system. He reported his conviction that the Russians are "troubled and amazed at the universal condemnation of their maladministration of justice".

Mr. Bonsal and Professor Hayes were instrumental in bringing to the attention of their bar association the need for American support to the International Commission of Jurists.

Work went forward quickly as the interest of other lawyers became aroused. On May 4, 1953, a meeting was held in New York at which Judge Learned Hand, John J. McCloy, Judge Proskauer, Dr. George N. Shuster and others addressed over three hundred members of the New York Bar. Dr. Van Dal, Executive Secretary of the International Commission, came over from Holland to speak to the meeting on recent progress made by the Commission.

Eli Whitney Debevoise, who had become familiar with the Communist concept of justice while serving as General Counsel to the United States High Commission for Germany, proposed resolutions which were unanimously adopted, endorsing the program of the International Commission of Jurists "in exposing systematic injustice and denials of human rights in countries lying behind the Iron Curtain and in bringing to such lawyers in those countries an attempt to secure justice and to protect such rights the encouragement and the understanding of the lawyers of the free world"; and further pledging to the program the sympathy and support of other lawyers and judges "so that all may join with those of the rest of the free world in the struggle for the victory of the forces of law against the force of tyranny and injustice".

A series of similar programs to be held before local bar groups across the United States is being developed at the present time.

As a result of the May meeting the American Fund for Free Jurists, Inc., was organized as a non-profit Delaware corporation with offices at 42 West Forty-fourth Street, New York 36, New York. Through a finance committee, the fund in June appealed to New York lawyers for support of the International Commission of Jurists as the beginning of a nation-wide effort to enlist the interest and support of American lawyers in the work.

That the program and purpose of the International Commission of Jurists struck a responsive chord throughout the profession is indicated by the immediate widespread response to the appeal. Letters offering support were received from interested lawyers who had attended the meeting. To date over $50,000 has been subscribed in the United States and between ten and fifteen thousand dollars has been tentatively promised from Sweden and Switzerland alone to carry out the program of the Commission.

The American Bar Association endorses the work of the International Commission of Jurists. A resolution was adopted both in the Assembly and in the House of Delegates at the 1953 Annual Meeting in Boston, which endorses the program in exposing systematic injustice and denials of human rights in the Iron Curtain countries and in bringing encouragement to lawyers in those countries who attempt to protect such rights. This endorsement opens to the legal fraternity in the United States and to members of the American Bar Association in particular a unique opportunity to participate in the defense of equal justice under law and the fight against injustice as a system. John J. McCloy in his address to the New York lawyers perhaps best summed up the job to be done:

> The lawyers of Eastern Germany, both those who have escaped to the West and those who have remained behind to carry on the work, are achieving the finest accomplishments that can come to members of our profession, and similar work in other jurisdictions carried out in a clear-cut objective manner can be as rewarding. Though most of us are too far removed from the scene to participate directly, we do have the privilege and indeed the duty to rally to the support our colleagues who are taking the risks and who are maintaining our common heritage.

Mr. Justice Horace Gray:

Some Aspects of His Judicial Career

by Elbridge B. Davis and Harold A. Davis

▪ Horace Gray was appointed to the Supreme Court of the United States by President Chester A. Arthur in 1881. He served on the Court until 1902, when he was succeeded by Oliver Wendell Holmes, appointed to the Court like Gray from the Chief Justiceship of the Supreme Judicial Court of Massachusetts. In his twenty-one years on the Court, Justice Gray participated in many famous cases—perhaps the best remembered is Pollock v. Farmers' Loan and Trust Company holding the nation's first income tax law unconstitutional. The older half-brother of Harvard's renowned John Chipman Gray, Justice Horace Gray was an aloof, austere man, noted as a martinet in court. Although he is remembered as a nationalist, the authors show that much of Justice Gray's legal philosophy favored state's rights.

▪ Horace Gray, Jr., was born in Boston on March 24, 1828, and was reared on Beacon Hill. His father, Horace, Sr., a leading citizen, was an iron manufacturer and coal merchant, and his grandfather, William Gray, had been a ship owner. John Chipman Gray, the great legal scholar, was a younger half-brother of Horace.[1] The family enjoyed a high position in the community. At Harvard, where he was graduated in 1848, Gray's chief interest had been natural history, and he became a close friend of Louis Agassiz, one of his teachers. Shortly before his death Justice Gray told a friend that had Agassiz come to the United States two years earlier he (Gray) would have become a natural scientist.

In 1848 the firm of Horace Gray, Sr., went through bankruptcy, and his son was compelled to hurry home from abroad, where he had been travelling extensively, to choose a profession. But the family fortunes revived since Justice Gray was reputedly wealthy when he came to the United States Supreme Court. Meantime the young traveller entered Harvard Law School and before graduating in 1849 won recognition as an outstanding student. In those days the law school had about ninety students and a faculty of four. The influence of Joseph Story, late Dane Professor of Law, was still strong.[2] Gray studied under Joel Parker, former Chief Justice of New Hampshire, later regarded by Justice Oliver Wendell Holmes as one of the greatest of American judges;[3] Simeon Greenleaf, a noted lawyer; Franklin Dexter, formerly a United States District Attorney; and Theophilus Parsons, also highly regarded by Holmes. Under Story, law was studied as legal philosophy; principles were expounded from texts; and professors, most of whom had been judges or successful practitioners, spent much time reminiscing. Moot courts, presided over by the faculty, were held frequently. It was here that Gray began to follow the system, later inaugurated at Harvard by his friend Professor C. C. Langdell, of studying law by examining leading cases bearing on the case in question, *i.e.*, the case method.

After leaving law school and prior to his admission to the Bar in 1851, Gray studied in Boston in the offices of Sohier and Welch and of John Lowell. Shortly afterward he was appointed temporary substitute to Luther S. Cushing, Reporter for the Massachusetts Supreme Court, and prepared Volume XII of Cushing's Reports. He was appointed reporter in 1854 by Governor Emory Washburn. The reportership was an office of considerable prestige and often became a stepping stone to the Bench. Gray's life from now on was very active. Besides editing volumes 67 through 82 of the Massachusetts Reports, he carried on a private practice arguing thirty-one cases

1. Unless indicated otherwise details about Gray's personal life and early career have been drawn from: Williston, *Horace Gray*, 8 GREAT AMERICAN LAWYERS, Lewis, W. D., ed., (Philadelphia, 1909); Hoar, *Memoir of Horace Gray*, 18 PROC. MASS. HIST. SOC. (Second Series, 1903-1904); Adams, *Tribute to Horace Gray*, 11 PROC. MASS. HIST. SOC. (2d Series) (1903).

2. Warren, HISTORY OF THE HARVARD LAW SCHOOL (New York, 1908). Chapters 25 to 38.

3. Bent, JUSTICE OLIVER WENDELL HOLMES (Garden City, 1932) page 130.

before the Massachusetts Supreme Court, in some of which he was associated with or opposed by such eminent counsel as Rufus Choate, Benjamin R. Curtis, Sidney Bartlett, John Lowell and Dwight Foster. John Codman Ropes considered him the best lawyer in Boston.[4] From 1857 to 1859 he was a partner of Ebenezer Rockwood Hoar, and for a brief period Henry Adams was in his office as a student.[5] Gray soon won recognition as an authority on the Suffolk County Reports and early Massachusetts history and in 1864 wrote his famous appendix to the "Writs of Assistance" case argued by James Otis.[6]

The future Justice took an active interest in public affairs. Despite the influence of Beacon Hill and his own natural conservatism, he became a Free-Soiler, which may account for the fact that he made no headway in politics. His cold, aloof bearing, sharp temper and his preference for study and research go further toward explaining this. In 1857 Gray aided John Lowell, editor of *The Monthly Law Reporter,* in preparing a review of the *Dred Scott* decision.[7] He became a Republican shortly after the organization of the Party and throughout his life continued to be an ardent supporter of the Republican cause. In 1860, at the Republican state convention, he failed in an attempt to secure the nomination for Attorney General. After 1861 he was consulted frequently on legal matters by Governor Andrew. Though a strong pro-Union man during the Civil War, Gray's enthusiasm for the cause was not sufficient to draw him away from legal activities in Boston for long periods. He was influential in securing an appointment as Judge Advocate for his younger half-brother, John Chipman Gray.[8] The young lawyer's attitude toward most of the problems of the war is difficult to determine, but he did question the constitutionality of the Emancipation Proclamation.[9] He opposed trial for Lincoln's assassins, though he soft-pedaled his opposition so as not to embarrass the Administration.[10]

In 1864 Governor Andrew named Gray Associate Justice of the Supreme Judicial Court of Massachusetts. Then thirty-six, he was the youngest man ever chosen. The Court had six members and enjoyed a high reputation. To some extent it was under the influence of the late Chief Justice Shaw and maintained traditions of an earlier period. It still had common-law jurisdiction, was the supreme court of probate and the only court of equity or divorce. It sat together to hear appeals and individually conducted trials in the first instance. Gray appreciated the value of such training in deciding questions of fact and considered it a great aid in his later appellate work.

A Noted Scholar . . . *A Masterful Lawyer*

Already he was a noted legal scholar and had become an active member of the Massachusetts Historical Society. He carried his ideas of historical research into his judicial work and leaned heavily on precedent, his technique in the preparation of a decision being to state the question, bring forward an imposing list of authorities, and at the end to sum up the situation, expressing his opinion in a paragraph or two. His summaries were often masterfully done. Usually he confined himself strictly to the matter at hand, seldom adding anything by way of dicta. In one of his opinions, *California* v. *San Pablo Railroad Co.,* 149 U.S. 300 (1893), he said that "the court is not empowered to decide moot questions or abstract propositions". Gray became recognized as an authority on common law and equity. Many of his decisions deal with real property, contracts, patent law, perpetuities and charitable trusts. In *Commonwealth* v. *Nathan Holbrook,* 10 Allen 200, delivered shortly after the Civil War, Gray upheld state liquor laws against sellers who maintained that payment of United States internal revenue taxes exempted them, a position similar to Chief Justice Waite's dissent in *Robbins* v. *Shelby County Taxing District,* 120 U.S. 489 (1887).

In *Briggs* v. *Light Boats,* 11 Allen 157, one of his most important decisions, he went into a historical discussion of the liability of the United States Government to be sued taking a line developed later in his dissent in *United States* v. *Lee,* 106 U.S. 196 (1882).

On the death of Chief Justice Chapman in 1873, Gray was appointed in his stead by Governor William B. Washburn. Already he had a high reputation in England as well as the United States. In the 70's and 80's he made several trips abroad and once sat with the Court of Appeals in London.[11] During nine years as Associate Justice, Gray wrote 515 decisions and during his Chief Justiceship, 852. In 1873 he wrote 133 opinions out of 484 and from then on maintained about the same ratio. He dissented only once in his seventeen years on the Massachusetts Bench. Gray did much to establish the jurisdiction and practice in equity when not sitting with the full bench.

The Justice was a stickler for judicial dignity, sometimes almost a martinet. Tall, powerfully built, with full face, chin whiskers and a high forehead, he looked every inch a judge. His portrait is rather forbidding, his face cold and set, his eyes hard and piercing. On his elevation to the United States Supreme Court amusing stories were told of his punctiliousness and severity. The *New York Times* of December 20, 1881, carried an account of a man summoned unexpectedly before Court who appeared in shirt sleeves only to be lectured sternly by Gray who sent him out to dress properly. And the *Times* of March 13, 1882, featured another story:

4. Ford, WAR LETTERS, 1862-1865, OF JOHN CHIPMAN GRAY AND JOHN CODMAN ROPES (Boston and New York, 1927) page 325.
5. Adams, THE EDUCATION OF HENRY ADAMS (Boston and New York, 1918) page 109.
6. Thayer, James B., CASES OF CONSTITUTIONAL LAW (Cambridge, Mass.), 1894-1895, pages 48-55.
7. Gray, Horace, A LEGAL REVIEW OF THE CASE OF DRED SCOTT, Boston, 1857.
8. Ford, *op. cit.,* page 392.
9. *Ibid.,* page 73.
10. *Ibid.,* Ropes to Gray, June 27, 1865.
11. F. Delano Putnam to Harold Davis, January 8, 1938.

> The Bar here is looking for an outburst from Justice Gray. His Massachusetts reputation has come here [Washington] before him. His tirades against trembling deputy sheriffs and frightened witnesses have been told about over and over again. Only two lawyers in Boston have ever been able to turn the tables on him. One was Henry E. Payne and the other Sidney Bartlett. "If your Honor please," said Payne one day, beginning a motion. "Sit down, Sir, don't you see I'm talking with another justice," thundered the then Chief Justice. Mr. Payne took his hat and walked out of the Courtroom. A half-hour afterwards a messenger reached his office saying Judge Gray was ready to hear him. "I am not willing to be heard," answered the old lawyer, "until Judge Gray apologizes" and apologize the judge had to.
>
> "Mr. Bartlett," said the Chief Justice one afternoon, throwing himself back in his chair, "that is not law and it never was." The veteran smiled, and looking over the bench said: "It was law, your Honor, until your Honor just spoke."

A note in No. 36 of the *American Law Review* (page 387) jokingly stated that the Massachusetts Bar, tired of Gray's petulance, had recommended him for the United States Supreme Court in order to be rid of him. But Justice Gray was by no means the only hard-boiled member of the Massachusetts Bench. "A tradition of bad manners had been associated with the Supreme Court of Massachusetts . . ." at the time of E. R. Hoar's appointment. Hoar was noted for his irritability, and Chief Justice Shaw had had a similar reputation.[12]

However he appeared on the Bench, Gray was genial and kindly among friends and well liked by his secretaries. Charles Francis Adams, Jr., described him in his late fifties as attractive and sympathetic, with a certain "brusqueness of manner and roughness of occasional speech which caused him to be criticized by many but which was not apparent. . . . Active of limb and quick of mind", there was "a frankness, geniality, and friendliness of manner about him, an apparently outspoken enjoyment of life and companionship which appealed strongly".[13]

Gray's appointment to the United States Supreme Court was seriously considered by President Garfield early in 1881. The resignation of Justice Clifford of the New England circuit, whose mental faculties had been impaired by long illness, was expected. He refused to resign, but died in the fall of '81 shortly after Garfield's assassination. Gray was well known to the Senate and to the judges of the New England circuit. Garfield had asked Senator G. F. Hoar for a collection of Gray's decisions, and he in turn asked his brother, E. R. Hoar, Gray's former partner, to get them. Judge Hoar applied to Gray, who, suspecting the motive, refused.[14]

The appointment was made by President Arthur on December 19, 1881, and confirmed the next day by the Senate by a vote of fifty-one to five. Coke, of Texas, Benjamin F. Jonas, of Louisiana, Zebulon Vance, of North Carolina, James D. Walker, of Arkansas, and George D. Vest, of Missouri, were opposed.[15] They were Democrats, had been prominent Confederates and may well have borne grudges against Senator Hoar, a strongly partisan Republican, who claimed in his autobiography (Volume II, page 328) that he had been chiefly responsible for the selection of Gray. Vance and Vest, men of decidedly Populistic leanings, might also have felt strong aversion to the appointment of an Eastern conservative at a time when state regulatory legislation was becoming subject to attack in the Court.

The choice of Gray met with general approval, and press comment was overwhelmingly favorable.[16] Former Secretary of the Treasury George S. Boutwell also sought the office.

> Some good influence, [says Mrs. Henry Adams, writing to her father] has been at work here lately which does not appear. . . . Arthur [the President] is on the "road to Damascus," and if he doesn't put the scales, which seem to be falling from his eyes, into Boutwell's hands, Judge Gray may get a seat on the Supreme Bench after all. Folks are waiting with bated breath to see.[17]

Justice Miller of the Supreme Court, supported by Justice Harlan, recommended Gray's appointment.[18] "He is the choice of our Court", wrote Miller, "and of the Massachusetts delegation." Gray's highest ambition had now been realized. "The Supreme Court," he once said in a letter to E. R. Hoar, "has aways seemed to me the greatest judgment seat in the world. . . ."

When Gray came to the Bench, Chief Justice Waite was overshadowed by several of his associates.[19] There was Field of California, dynamic, colorful, a Lincoln appointee, believer in natural rights, the higher law, laissez faire, defender of property rights and personal liberties, and in his later years fearful of the rising tide of the Populist revolt.[20] Field disapproved thoroughly of Gray, who opposed him frequently in divided opinions and who turned to precedents rather than to natural law, and characterized his new colleague by "an imprintably robust phrase".[21] Then there was John Marshall Harlan, of Kentucky, Southern gentleman and former slaveholder who had supported the Union during the Civil War. Appointed in 1877, Harlan served until 1911 and became known as the great dissenter.[22] Samuel F. Miller was another of Lincoln's appointees. A country doctor in the Kentucky mountains, he turned to the study of law after being appointed a justice of the peace and migrated to Iowa where he became prominent in the Republican Party. His powerful intellect and commanding personality more than offset his deficiency in legal knowledge.[23] He was suc-

12. Moorfield and Emerson, EBENEZER ROCKWOOD HOAR, A MEMOIR (Boston and New York, 1911) page 120.
13. Storey, *Horace Gray*, LATER YEARS OF THE SATURDAY CLUB, (Howe ed., Boston and New York, 1927) pages 47-53.
14. 2 Hoar, AUTOBIOGRAPHY, page 328.
15. CONGRESSIONAL RECORD 1881.
16. 2 Warren, THE SUPREME COURT IN UNITED STATES HISTORY (Boston, 1926) page 623.
17. Thoron, LETTERS OF MRS. HENRY ADAMS (Boston, 1936) page 312.
18. Fairman, Charles, MR. JUSTICE MILLER AND THE SUPREME COURT (Cambridge, Massachusetts, 1939) page 384.
19. Trimble, CHIEF JUSTICE WAITE (Princeton U. Press, 1938).
20. Swisher, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW (Washington, 1930).
21. Nelles, in 40 YALE L. JOUR. 998.
22. Clark, CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN. (Johns Hopkins Press, 1915).
23. Fairman, *op. cit.*

ceeded by Justice Brown in 1890.

Joseph Bradley, named by Grant on the day the first legal tender decision was handed down and whose dissent in the slaughter house cases, 16 Wall. 36 (1873), anticipated the later concept of due process, was another of Gray's colleagues. In 1892 he was succeeded by Shiras. Other fellow Justices were Stanley Matthews, whose daughter Gray married in 1889; Matthews' successor, David Brewer, nephew of Justice Field and unbending supporter of property rights;[24] Chief Justice Melville W. Fuller and his successor, Edward D. White; the former Confederate statesman and United States Secretary of the Interior, L. Q. C. Lamar; and Howell D. Jackson, of Tennessee, and his successor, Rufus Peckham, a New York corporation lawyer.

United States v. Lee . . . *Mr. Justice Gray Dissents*

Gray is remembered as a great nationalist, a reputation based upon earlier opinions. Dissenting in *United States* v. *Lee,* 106 U.S. 196 (1882), his first important decision on the Court, he took a highly nationalistic tone. The Arlington National Cemetery, formerly Robert E. Lee's estate, had been taken over during the Civil War by the United States Government under a direct tax sale. The Lee heirs sought to recover it from United States officers by an action of ejectment; they were upheld by Justice Miller speaking for the majority. Granting that the United States could not be sued without congressional permission, Miller held that this principle did not apply to federal officers and that the lawfulness of United States possessions so held may be a proper subject of judicial inquiry. It was further implied that determination of due process was peculiarly the province of the judiciary. Gray, supported by Waite, Bradley and Woods, took the position that this actually was a suit against the United States, that exemption of a sovereign power from suit applied to the United States as well as to England, that the Court lacked authority to render a judgment on which it had no power to issue an execution and held the action to be a direct encroachment upon the legislative and executive departments, a more modest view of the Court's power than that expressed by the majority.

Two years later in his best known decision, *Julliard* v. *Greenman,* 110 U.S. 421 (1884), Gray carried his views of sovereignty even further. This was the last of the legal tender cases. In the first, *Hepburn* v. *Griswold,* 8 Wall. 603 (1870), a four-to-three decision, Chief Justice Chase held unconstitutional as applied to contracts made before their passage acts he himself had sponsored while Secretary of the Treasury. The appointment of Justices Bradley and Strong upset the majority, and in *Knox* v. *Lee,* 12 Wall. 457 (1870), the *Hepburn* case was reversed, and paper money was held to be legal tender both for past and future contracts.

These two cases applied only to legal tender issues as a war measure. In the *Julliard* case where the Act of May 31, 1878, providing for the reissuing of legal tender notes after they had been received into the treasury was sustained, Congress was declared to have the power to make treasury notes legal tender in time of peace. Such power was upheld as being inherent in sovereignty. With regard to contracts which might have been affected Gray said in part:

> If, upon a just and fair interpretation of the whole constitution, a particular power of authority appears to be vested in congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected.

The question was held to be a legislative and not a judicial matter. For once Gray was hard put to find precedents, and in his search turned even to the Austro-Hungarian monarchy. Field, in a lone, vitriolic dissent, used Sumner's expression that "what was once the medicine of the country had now become its daily food", and went on to paint a gloomy picture of the dangers which might result from the acceptance of the majority view. There was considerable excitement over the decision. Railroads and municipalities with their heavy bonded indebtedness, other debtors and the public in general were satisfied, but there was a good bit of conservative disapproval.[25] Shortly afterwards at a Washington dinner party attended by Gray, President Arthur, Justice Blatchford, George Bancroft and several others, the decision came up for discussion.[26] The President was pointed in his criticism and there was much raillery which Gray took good naturedly but with surprise and embarrassment. He failed to uphold his end of the argument very well especially in the matter of sovereignty.

In several cases involving Chinese immigration questions of sovereignty, due process and citizenship were considered. In *Nishimura Ekin* v. *United States,* 142 U.S. 651 (1891), Gray upheld the Immigration Act of 1891 which was aimed at the Chinese and forbade the entry of certain classes of aliens. Following up *Chae Chan Ping* v. *United States* 130 U.S. 581, an earlier Chinese exclusion case, he held that this was within the power of every sovereign nation. Nor could the judiciary order that foreigners be permitted to enter the country in opposition to constitutional measures of the legislature and the executive; as to such aliens decisions of these two branches of the government were due process. In *Fong Yue Ting* v. *United States,* 149 U.S. 698 (1893), the Greary Act of 1892 requiring Chinese laborers in the United States to get certificates of residence within a year and calling for the arrest and deportation of any who failed to do so was upheld by Gray. It had been passed in an election year at the demand of west coast labor groups concerned over the illegal entry of large numbers of coolies. The right to exclude

(*Continued on page 468*)

24. Swisher, *op. cit.*

25. Warren, *op cit.*, Volume II, pages 654-660; Neil, *The Legal Tender Decision,* 1 Pol. Sci. Q. (1886); Adams, *The Consolidation of the Colonies,* 55 Atlantic Monthly, (March 1885).

26. 1 Gresham, Life of Walter Q. Gresham (Chicago, 1919) pages 435-436.

Legal Clinics and Law Students:

Rocks and Cement for Better Legal Education

by **John S. Bradway** · **Professor of Law at Duke University**

In this article, the Director of the Legal Aid Clinic at Duke University replies to C. Clinton Clad, whose article, "The Gap in Legal Education: A Proposed Bridge", was published in our January issue. Mr. Bradway contends that Mr. Clad's metaphor is an oversimplification. The problem of preparing the newly admitted lawyer for practice is not a gap over which a bridge must be built from the theoretical teaching of the law school, but rather, Mr. Bradway holds, a problem of finding concrete to cement together and fill the interstices between the rocks of knowledge acquired in law school.

In the JOURNAL for January, 1955, page 45, C. Clinton Clad has given us a stimulating article: "The Gap in Legal Education: A Proposed Bridge". The gap of which he writes is the well-known and extensively discussed area between the theoretical knowledge of the lawyer fresh out of law school and the practical experience which he should have properly to serve his client. The particular bridge which he presents as a solution is a sort of legal clinic to handle the functions both of Legal Aid and Lawyer Referral Service. As the footnotes to Mr. Clad's article indicate, this is not an entirely novel problem. He follows the normal procedure of pointing out what he regards as inadequate in the present efforts toward this type of bridge building and gives us his views on how the defects should be remedied.

With much of Mr. Clad's argument, I am in hearty agreement. He has performed a useful service both in keeping the topic before us and in assembling a great deal of the material in which others have expressed their views as to a solution. When, however, he takes a dim view of Legal Aid Clinics and their potentialities, I am unable to agree with him. Up to now those of us who operate Legal Aid Clinics have not participated in the discussion, which, for the past two or three years has raged in the pages of the JOURNAL and elsewhere. The articles, able and discriminating, which have been presented, are written by those who may be described as observers rather than participants. There is certainly reason to give audience to some of us who are spending a goodly portion of our lives wrestling with this problem. Whether our point of view is sound or not, only time will tell. But it is fair to assume that we have a point of view and that it is based on hard won experience. My purpose is to restate the problem as I see it; to suggest how the present day Legal Aid Clinics are proceeding by the trial and error method to solve that problem; to comment upon the extent to which the Legal Aid Clinic with which I am connected is now doing most, perhaps all, of the acts which Mr. Clad urges should be done. My point is not that in principle his demands for a solution are unreasonable, quite the contrary; but it seems to me Legal Aid Clinics already are doing or readily can, in due course, be made to do those necessary acts better, more quickly, less expensively than could other agencies. To many of us participants, the Legal Aid Clinic is quite a remarkable device. In the hands of imaginative, resourceful, hard-working, dedicated people it can accomplish more than is presently apparent to observers.

With this thought in mind I shall take the liberty of restating Mr. Clad's figure of speech involving the "gap" and the "bridge". I shall discuss his remark on page 47, where he states: "In short, it [The Legal Aid Clinic] gives him [the student] a great deal of practical training. But, as with all such ideas, it falls short because the student, not having been admitted to the bar, cannot actually practice law." I shall refer briefly to the work done in the Duke Legal Aid Clinic with such topics mentioned by Mr. Clad, as "facts" and "nonlegal skills".

A Box, Not a Bridge . . . *The Basic Figure of Speech*

A word picture of a gap with a bridge to be built over it has several advantages in the present situation. It is simple and challenging. I suggest, however, that it may turn out to be an oversimplification. For one thing, it starts too late in the over-all educational process. Some of us who have given the matter thought are rather partial to another phrase—"rocks in a box". We admit that this, too, is not adequate but at least it suggests, to our way of thinking, certain other aspects of the problem which we regard as important and a broader pattern of solution which deserves to be kept in mind.

In our efforts to visualize this particular task of practical training for law students as a basis for our investigations as to the most desirable solution, we start with a phrase that has little novelty about it. We say that the purpose of legal education is to *teach the student to think like a lawyer*. Of the three significant words in this phrase "teach", "think" and "lawyer", we shall have space presently only for the second. Presently there is a widely held assumption that three, or perhaps four, years in the student's life are all one can expect to devote to the law school aspect of this thinking process.

If our pattern of legal education is limited to three (or four) years spent full time in law school, the problem is how to cram into that short period all the student should know. It is obvious that something must be omitted. It is also obvious that we can not, in such a framework, turn out fully matured practitioners. But if we enlarge our horizon so that instead of three years we are looking at a lawyer's professional lifetime, the congestion is relieved. A teaching program which would devote three years to basic data, to be followed by part-time instruction on advanced matters might be of great benefit. Part-time instruction applied over the forty or more years of a lawyer's active professional life would greatly improve the quality of the product which the profession dispenses to the public. This improvement, in time, would result in benefit to everyone concerned: lawyer, profession, law school and most of all client and general public. The point is that after three years of case method instruction there is a place for something which we presently call the Legal Aid Clinic method.

When I entered law school my mind, as far as law was concerned, was at least open. I thought of it as a box, which, in due course, was to be filled up and on which I should eventually stand when I began to practice my profession. Each course which I took went into the box. To describe each course as a rock may suggest to some readers the idea that my purpose is to disparage the courses which my colleagues teach. My purpose is not by way of criticism merely to illustrate why the gap and bridge figure of speech seems not adequately to cover the present situation. In my first year in law school I placed in the "box" a series of "rocks". Each one was excellent in itself and any defects in them were due to me and not to my instructors. In each of the succeeding years I placed in the "box" another tier or layer of "rocks". Again each one was excellent in itself.

When I emerged from law school and attempted to stand upon this foundation I found two major limitations—the base was not wide enough; the base was not firm enough. If I had had time to come back to law school and pick up more rocks the base would have been wider. But the lack of firmness was another problem.

Rocks are not the equivalent of bricks. In building a brick foundation dovetailing is an asset. Rocks, unless specially shaped, do not fit closely, one against another. There are interstitial areas. They provide not a seamless web of the law such as one deals with in practice, but a broken and interrupted pattern. It took me some years of mistakes and humiliation before I could feel confidence in the firmness of the professional foundation in my own mind.

The Legal Aid Clinic attacks this second problem of the lack of firmness in the professional foundation. To use Mr. Clad's figure of speech, it is concerned primarily with building solid abutments upon which a bridge also to be built will eventually rest. For a time, we tended to think of the legal aid clinic commodity—the substance which is communicated by instructor to student—as another rock. More recently we are beginning to wonder whether the word cement or concrete may not be a more accurate description. Concrete poured into a box of rocks will, in due course, harden and hold them firm, dependable as a base of professional operations.

The rocks in a box analogy leaves much to be desired and we hope in time to discover a better one. But it does serve in the instant situation to point up the problem with which we are dealing. Let us now consider—When should the concrete be poured?

Learning To Practice Law . . . *Before or After Law School*

Mr. Clad, it seems, would prefer to substitute for the Legal Aid Clinic instruction in law school, a period spent by the student after admission to the Bar in a legal clinic outside of the law school in which services would be rendered to clients who can pay only a small fee or none at all—the traditional domain of Lawyer's Referral Service and Legal Aid. His argument is that persons not admitted to the Bar cannot practice law. I assume that what he has in mind is that a newly admitted member of the Bar does not "feel" like a lawyer until the full sense of professional responsibility rests upon him.

I agree with Mr. Clad that there must be a period when the embryo lawyer gains experience in practical training. I also share his enthusiasm for the excellent public services being rendered by non-law school Lawyer's Referral Services and Legal Aid Societies. I am not so clear, however, that the non-law school Lawyer's Referral Service or Legal Aid So-

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ciety offices are the places for this phase of legal education.

Here again let us define the problem before we set about determining a solution. It seems to me that we have two problems here and that each may require its own form of solution. The first is that of the inexperienced lawyer already admitted to the Bar. The second is of the continuing stream of law students who, through the years to come, will be applying for admission.

(1) There are probably at the present time members of the Bar who, even though they have licenses, do not know how to practice law. For the sake of everyone concerned, they should seek this instruction. If, in a particular community, it can be given in a Lawyer's Referral Service office or Legal Aid Society and not in a law school, then by all means, we should see that it is given as quickly and as well as possible. But, if it can be given in a law school, I should prefer that solution because a law school is set up to teach, a Legal Aid Society or Referral Service office to serve the public. This problem of the lawyer already at the Bar is at most only temporary. It does not require too much long-range planning. It should be completely solved in the reasonably near future.

(2) The other problem is of a different sort. Year after year in the future, law students will be readying themselves to practice law. For them, something more permanent in the way of a solution is necessary, concrete as well as rocks. I urge here that a substantial amount of practical training should be given before admission to the Bar and that this instruction should be followed up year after year on a part-time basis as long as a lawyer is in active practice. I also urge that the law school—the law school of tomorrow if you prefer—is the agency upon which the responsibility for this instruction should rest.

Why the law school? The alternatives are not so promising. The individual law office is declining in effectiveness as an educational agency.

The medical profession has abandoned apprenticeship instruction, at least basic instruction in private doctors' offices. A bar association program of education will operate only when the bar association is strong enough and financially able to do a first class job. Even in Pennsylvania and New Jersey, which have prided themselves on their bar association apprenticeship programs, there are rumblings of discontent. Legal Aid offices and Lawyer's Referral Services can hardly be expected to supply the necessary quantity and quality of instruction and supervision. We do not have in this country any agency exactly comparable to the English Inns of Court, which may be described as law school bar associations. The law school with a Legal Aid Clinic attached could expect to provide somewhat the same coverage and continuity. In fact, with due respect to Mr. Clad, it is already well along the road to solving the problem.

Why instruction and supervision? Why not give the young lawyer a license, sit him down at a desk, bring in an impecunious client, shut the office door and hope that the better man may win? The answer is that the profession should not be content merely to have the lawyer learn to practice law by bull-in-a-china-shop methods. What we want is to have him practice it on the highest professional level, one which will win public respect for lawyers. This means that he should conduct himself in a manner not only to serve himself but to be of value to client, court, profession and community. To attain such a professional goal, a high quality of instruction and supervision for an extended period seem quite essential. We shall come nearer getting a professional grade of concrete from law schools than from some other agency.

When should this instruction and supervision be given? Mr. Clad is content that it should come at a time when the lawyer is licensed to practice law—after admission. My argument is that it should come both before and after. Assuming, however, that instruction beforehand should be given in basic matters and that training in advanced work should come after admission, where should the line be drawn? The medical profession, when faced with a similar problem, decided it by preparing the young doctor to be a general practitioner and then giving him further instruction in specialized fields.

The mental pictures of a general practitioner of law and a specialist may be clarified in a variety of ways. A board of bar examiners already selects topical fields of law in which it requires student proficiency. It might, without too much trouble, list a group of *functional tasks* on which there is some reasonable agreement and require as to each of them that the student must demonstrate a degree of proficiency in execution. After admission, it is possible to determine how many more functions a lawyer should be able to perform in a professional manner before he is allowed to hold himself out as an expert.

It is not unfair to public or student to require that before the latter be handed a license to practice, he should be required to demonstrate not only that he can write an examination set by the board of bar examiners, but can also do in a pro-

fessional manner certain basic acts which the public has a right to expect a licensee to be able to do. The Legal Aid Clinic can teach the student how to do them.

Consequences of our present system are not limited to the individual student. There are public relations implications. An inexperienced person in any field of activity tends to make mistakes. For that matter even experienced persons make some of them during the whole of their lives. None of us is proud of these mistakes, particularly when they are avoidable. Many of us labor diligently to keep them to a minimum. I realize the impatience of the law school student to get started earning money. I also realize the bad publicity to student, profession and law school which comes when a person bearing a license to practice makes elementary mistakes. A Legal Aid Clinic operating before the student is admitted will substantially reduce the number of elementary mistakes he is likely to make. A Legal Aid Clinic operating after a student is admitted and while he is preparing himself to become an expert will substantially reduce the number of mistakes, which are not of an elementary character.

Legal Aid Clinic instruction is quite realistic. It deals with professional "tools". It gives exercises in how and when to use them. Of course, in one sense, a man can study law without any law school instruction or supervision, perhaps he may even be able to pass the bar examination. But few of us are willing to approach such a difficult problem in such an inefficient manner. We go to law school because it can give us something we should be a long time in getting for ourselves. So in the matter of learning to practice law—the cement which holds the rocks together.

There is another aspect of the problem which calls for help from the law schools—the varying qualifications of the applicants. Let us suppose that in Jurisdiction *X* the board of bar examiners decreed that no one should be granted a license to practice law unless and until he had demonstrated his ability to do in a professional manner fifteen different acts which a reasonable client may expect of a general practitioner of law. These might include such routine practices as writing a letter, interviewing a client, searching a title to real estate, preparing a case for trial, writing a trial brief and others. I mention these because the student in the Duke Legal Aid Clinic learns how to do them before admission. Student *A* may do a creditable job the first time he is confronted with the challenge. Student *B* will, perhaps, show aptitude in interviewing clients but be quite slow in writing a brief or building a legal document. Student *C* may be slow all along the line. To meet such diversity of qualifications requires a flexible individualized type of instruction and supervision. It is not enough to prescribe a period of time —a month—a year. Student *A* will be frustrated because he is ready for law practice long before the end of the period. Student *C* may not be ready after the elapse of the prescribed time. But the public should be assured that *A*, *B* and *C* are not admitted until competent observers are satisfied that they can give a good account of themselves.

It is not enough to prescribe the tasks to be learned. Instruction and supervision are needed to see how well each student is prepared to perform them. What is true for skills before admission is also true for those to be learned when one is becoming an expert. Instruction and supervision are worth all they cost and they can be obtained more effectively and less expensively in a law school than elsewhere.

If Mr. Clad were to examine several groups of young lawyers with varying educational backgrounds but of reasonably comparable native ability, it is not unlikely that he would find those who had Legal Aid Clinic training would deserve to be in a preferred class. In other words Legal Aid Clinics, properly run, need not "fall short" of Mr. Clad's very reasonable expectations.

Learning Skills . . . "*Fact*" and "*Non-Legal*"

The Particulars. When Mr. Clad says that Legal Aid Clinics "fall short" he probably has in mind the disciplines which he mentions in the latter part of his article—"facts" and what I take the liberty of paraphrasing as community non-legal skills. I agree with Mr. Clad that a lawyer needs these disciplines. However, I have more confidence than he does in the ability of the Legal Aid Clinic to supply them. This is because the Duke Legal Aid Clinic does go a long way already in supplying them. I am conservative enough not to favor a policy of swapping horses in mid-stream. Let me illustrate:

As to facts: We give lectures, demonstrations, individual instruction in recognizing, gathering, evaluating, processing and using facts in legal proceedings in and out of court. Then the student deals under supervision with real clients who have real problems and real facts. As competence is developed the supervision is relaxed so that the student gradually gains the self-confidence and self-control desirable for a professional person. If the curriculum committee could give us more time we could do a better job.

As to non-legal skills: We again should define the problem. We do not proceed on the theory that a lawyer must be omniscient. It takes him all his life even to learn to be a good lawyer. He should not be distracted by having thrust on him the additional duties of psychiatrist, physician, economist, sociologist and everyone else.

He need not learn the skills of psychiatry if he knows a psychiatrist, when to call him in and how to work with him on an interprofessional team.

In our view of the situation it is enough if he knows when to call in for consultation a physician, an economist, a sociologist, and the like. He also should know how to participate in interprofessional cooperation. In the Duke Legal Aid Clinic we have several exercises to

give the law student experience in dealing with persons who are expert in employing the tools of other professional disciplines. Then in actual cases the law student, always under supervision, has a chance to implement and perfect his skills.

Again, if the curriculum committee gave us more time we could do a better job. But we have demonstrated that this sort of work is feasible for Legal Aid Clinics. In a university community, the law student has more ready access to qualified non-legal instructors in other professional fields than is likely the case in later years when he lives off the campus. Here is the place to learn when to call them in for consultation and how to work with them.

Mr. Clad is quite right in criticizing the Legal Aid Clinic. His remarks are a challenge to us to do better. It is not necessary or even desirable for him to dismiss the Legal Aid Clinic as abruptly as he does. It is already doing a lot and is capable of doing a great deal more.

Seventy-eighth Annual Meeting:

Philadelphia Plans Elaborate Entertainment

■ Elaborate plans for the entertainment of members of the American Bar Association attending the 78th Annual Meeting in Philadelphia next August are rapidly nearing completion.

Two of the outstanding events will be an open-air luncheon on the beautiful new Mall fronting historic Independence Hall and a trip to the world-renowned DuPont Estate at Longwood Gardens, the program includes a wide variety of events designed for the pleasure of the visiting delegates.

The Mall luncheon will be a prelude to an open-air meeting of the Assembly and the ceremonies held in co-operation with the John Marshall Bicentennial Commission on Independence Square scheduled for Wednesday, August 24. There in the shadow of the Liberty Bell, which cracked when tolling the death of Chief Justice John Marshall, and of Old City Hall where he so ably presided over the Supreme Court of the United States, leaders of the nation's Bench and Bar will offer appropriate tribute to his memory commemorating the 200th anniversary of his birth. One of the highlights of the event will be the appearance of the Marine Corps' fife and drum unit. The luncheon will be tendered by the Philadelphia Bar Association through the courtesy of the Insurance Company of North America.

At Longwood Gardens, the well-known Savoy Opera Company of the City of Philadelphia will offer a performance of *Trial by Jury* in the famous open-air boxwood theatre on the spacious DuPont Estate. This will be followed by a display of the colored fountains which are a replica of the beautiful fountains on the grounds of the Versailles Palace in France. The Delaware State Bar Association is sponsoring this event. Scheduled for Sunday, August 21, the guests will be transported to Longwood in either busses or special trains through the courtesy of the Philadelphia Bar Association.

Other events planned for the entertainment of the Association members and their wives and families will include the traditional Red Mass which will be celebrated at the Cathedral of St. Peter and St. Paul on Sunday, August 21, a fashion show and tea and a tour of historic houses and Fairmount Park, the largest municipal park within city limits of any city in the world, for the ladies. This latter tour will include lunch at various country clubs and will be climaxed by a tea at Philadelphia's Public Library on the Parkway. A trip to the Fairless Plant of the United States Steel Corporation for the men and a party at the Zoological Gardens for both the members and their ladies have also been arranged.

In accordance with time-honored precedent, Loyd Wright, President of the Association, will be tendered a reception by the Pennsylvania Bar Association on Wednesday, August 24, in Philadelphia's imposing Art Museum when all members and their families will be given an opportunity not only to greet the officers of the Association and distinguished guests but also to view the best works of many of the old masters.

As a post-meeting attraction, a private travel company is offering a special trip to Bermuda on the *S.S. Silverstar* leaving Philadelphia on Friday, August 26, and arriving in Bermuda on Monday, August 29. The ship will leave Bermuda Tuesday at 5 P.M. and return to Philadelphia on Friday morning about 9 A.M.

John W. Davis—1873-1955

By Two of His Partners

■ John W. Davis, born in Clarksburg, West Virginia, on April 13, 1873, died in Charleston, South Carolina, March 24, 1955, in the sixtieth year following his admission to the Bar. His legal career embraced some seventeen years as an active country lawyer, twice as many as the head of a law firm in New York City and between the two periods a decade in public service.

His father, John J. Davis, was a leader of the West Virginia Bar who served three terms in Congress. When the younger John had completed his course at the Washington and Lee Law School he called on the elder Davis, as he used to tell the story, and asked for a job. His father slipped a sheet of paper in the office's only typewriter, typed out the names "Davis & Davis", and tossed it across his desk with the words "How do you like that, son?" It was the only partnership agreement they ever had during their many years together.

There was no period of Mr. Davis' life on which he looked back with greater pride. With his father he rode circuit over all of the eastern counties of West Virginia, with Coke and the rest of the common law in the saddlebags. He learned from him the worth of Daniel Webster's precept that clarity of statement is the great power in the law. As recently as January last he wrote to Judge Harmer, his oldest living Clarksburg colleague: "This I am willing to avouch: Whatever professional success I have had is due primarily to the training I got in the rough and tumble of the Clarksburg bar. It was sometimes rough and, as I look back, I did a good deal of tumbling, but it was a healthy discipline for all of that." In April, 1954, he told the Harrison County Bar that he deemed himself still "a country lawyer practicing in New York—which is all I am and all I ever wish to be."

He was early chosen for the West Virginia House of Delegates and at the age of 33 became President of the State's Bar Association. Four years later he was elected to Congress. There he served on the Judiciary Committee, helped write the Clayton Act, managed successfully the impeachment proceedings against Judge Archbald of the United States Commerce Court and began to be recognized beyond the boundaries of West Virginia as a lawyer and speaker of unusual ability.

The legislative chapter ended in 1913 when President Wilson named him Solicitor General. In the course of an intensively active five years he argued some sixty-eight cases before the Supreme Court. The list included such constitutional and other landmarks as the Pipeline Cases, the Peonage Cases, the Midwest Oil Company Case, the Grandfather Clause Case, the second Income Tax Cases, the Adamson Eight-Hour Law Case, the first Child Labor Law Case, the Selective Draft Law Cases, and leading antitrust cases against the United States Steel Corporation, Standard Oil Company of New Jersey and International Harvester Company.

The term as Solicitor General was followed by a diplomatic interlude that commenced in September, 1918, when he was sent as a delegate to the Bern conference on the treatment and exchange of prisoners of war. Two months later President Wilson named him Ambassador to Great Britain. The post-war years in London were not easy ones, but he successfully upheld the policies and independence of action of his country and at the same time established the friendship of and for the British people that lasted to the end of his life.

The period at the Court of St. James's was costly for a country lawyer. He used to tell his partners that when he returned to the United States in 1921 he had nothing left that he could call his own but his wife and his daughter. His close friend, Frank L. Polk, had the year before become a member of the firm then known as Stetson, Jennings & Russell. The late Allen Wardwell, at that time one of the senior partners in the Stetson firm, had been particularly attracted to Mr. Davis on an ocean crossing by the striking circumstance that he alone, of all those in a ship's program of speeches, kept himself within the five minutes allowed. He accepted an invitation to partnership in that firm and became its head on April 1, 1921.

That happy relationship continued for almost thirty-four years with only one brief break. In 1924 Mr. Davis was nominated—on the convention's 103d ballot—as the Democratic candidate to oppose Calvin Coolidge. Earlier it had been suggested to him that his chances for the nomination would be greater if he would sever the professional connections which had already brought him into close relation with some of the country's large financial interests. His response to this suggestion set forth his basic professional philosophy: "The only limitation upon a right-thinking lawyer's independence is the duty which he owes to his clients, once selected, to serve them without the slightest thought of the effect such service may have upon his own personal popularity or political fortunes. Any lawyer who surrenders this independence or shades this duty by trimming his professional course to fit the gusts of popular opinion, in my judgment not only dishonors himself, but disparages and degrades the profession to which he should be proud to belong. You must not think me either indifferent

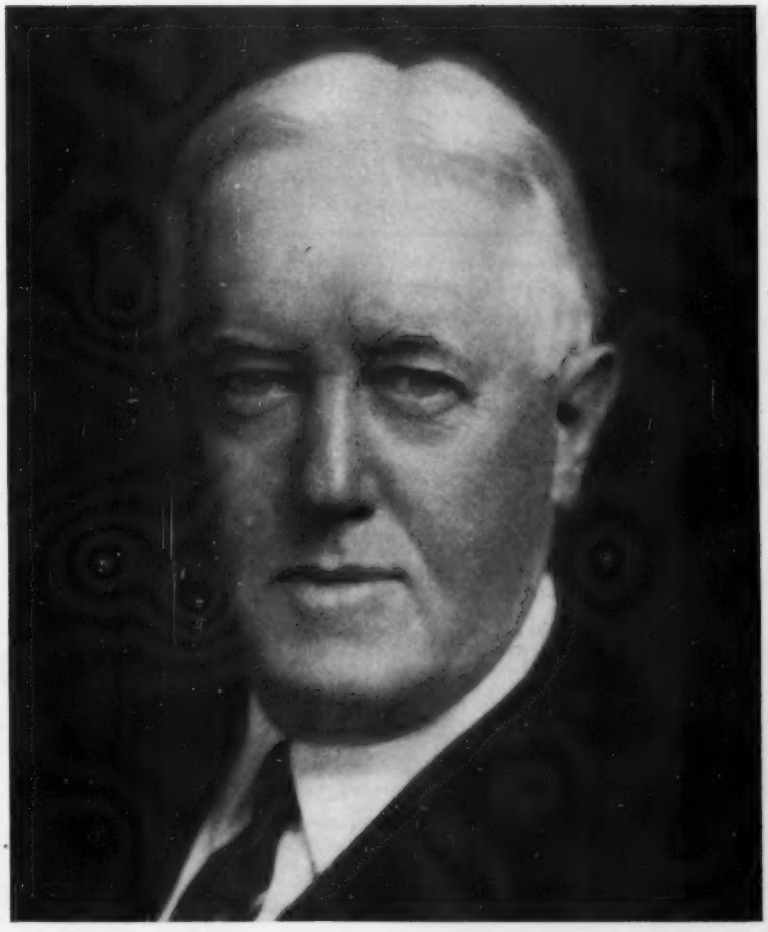
or unappreciative if I tell you in candor that I would not pay this price for any honor in the gift of man."

Mr. Davis' years at the New York Bar in many ways mark an epoch. He refused to be the mere head of a large organization, but toiled as a journeyman in the daily task. He made it a point to do some personal work with each new recruit in the office. He served the profession as President of The Association of the Bar of the City of New York and of the American Bar Association. He personally argued in the United States Supreme Court some seventy-two additional cases for a total of about 140, over and above the scores in which he appeared on the brief by way of petition for review or otherwise. His Supreme Court appearances culminated in two great arguments made in and after his eightieth year—the United States Steel case, in which the Court held unconstitutional the action of the Federal Government in taking over control of that company, and the school segregation case, in which he failed to establish the constitutionality of the South Carolina statute requiring a separation of white and colored children in public schools. He was proud of the fact that he never specialized and that his causes were a "mixed bag". His ideal in the legal profession is perhaps epitomized in his address to the Virginia Bar Association on August 4, 1926, "Thomas Jefferson: Attorney-at-Law" reprinted in the AMERICAN BAR ASSOCIATION JOURNAL for February, 1927.

There were many other appeals and trials in the federal and New York state courts. What is more impressive than their number is the wide range of their subject-matter, and the part they have played in the determination of the rights and obligations which together define the liberties of our generation. He pleaded with equal energy and ability the causes of those of high and low estate, of sovereign governments and humble citizens.

Mr. Davis' forensic accomplishments have for the public cast into the shadow his skill and efficacy as a counselor. If we could poll those who were privileged to be associated with him most closely during the past third of a century, the result would, we believe, show that they place an even higher value on his less spectacular work as a guide, confidant and adviser. His colleagues on many boards and committees will remember him for his quiet humor and firm judgment around the conference table. His partners and associates who grew up under his tutelage will think of that office door that was never closed and the gentle man behind the ancient desk who was never too busy to share their troubles, to enjoy with them their little successes or to discuss their problems and send them away with a feeling that they themselves had discovered the right solution.

Over and above all was his love of the law and his joy in his work. He always said that he never would retire, and he never did. Until the early months of this year his daily stint was greater than that of most much younger men. To the very end he subscribed to the philosophy in a passage from Trollope's *Autobiography* which he quoted to some of us not long ago: "I trust for my happiness still chiefly to my work—hoping that when the power of work be over with me God may be pleased to take me from a world in which, according to my view, there can be no joy."



John W. Davis, President of the American Bar Association, 1922-1923

AMERICAN BAR ASSOCIATION

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General Subscription price for nonmembers, $5 a year.
Students in Law Schools, $3 a year.
Price for a single copy, 75 cents; to members, 50 cents.
Members of the American Law Student Association, $1.50 a year.

EDITORIAL OFFICES

1155 East Sixtieth Street.....Chicago 37, Ill.

■ *John W. Davis–1873-1955*

Let us praise great men. Without their example the rest of us could never rise to that all-important grade from mere animal existence–to a realm where we recognize, even if we do not fulfill, our obligations to our fellow men. At wide intervals Providence sends those examples into the world. He was a shining example.

John Davis was a great lawyer and a lawyer's lawyer. He delighted in astounding his English barrister associates with the knowledge of common law pleading which he had acquired in West Virginia where, he told them, unlike the mother country, the wellspring of common law procedure still ran pure and undefiled.

He walked with kings nor lost the common touch. Those whose part he took in the courts ranged from the most powerful and popular to the humblest and most despised. If it ever crossed his mind that he might suffer from that perversion of the truth, identification of the lawyer with the man whose cause he espouses, he never let the thought abate the full vigor of his devotion to that cause. There is sharp division of opinion on the subject of segregation. Many of his clients must have been bitterly opposed to the fairness of this philosophy, but that did not deter him from taking a leading part in urging the opposite view upon the Supreme Court. In none of those cases where the call that he answered seemed to him to be the call of duty would he accept compensation.

To speak of his eminence at the Bar is like saying that Rembrandt was a good portrait painter. It would have been a reproach upon our organization if we had not made him our president.

We all feel that what has been lost was something of our own because his friendly kindness made him ours.

Let us be thankful that, in part of our momentary taste of being, we have lived in a world with one like the knight of whom Chaucer wrote:

> A Knight there was, and that a worthy man,
> That from the time that he first began
> To riden out, he loved chivalry,
> Truth and honour, freedom and courtesy . . .
> And though that he was worthy, he was wise,
> And of his port as meek as is a maid.
> He never yet no villany had said
> In all his life, unto no manner wight.
> He was a very parfit gentle knight.

■ *Peter Zenger's Legacy*

American lawyers are always alert to matters affecting an accused's right to a fair trial. This right is a sacred one protected by the Sixth Amendment. However, before we reach the Sixth Amendment, in reading our Bill of Rights we find enshrined in the First Amendment the right of freedom of the press. Recent cases involving newspaper reporting of trials and editorial comments on them have sharpened the inevitable conflict between the two great principles embodied in these amendments.

Canon 20 of our Professional Ethics relates to the lawyer's part in the matter of publicity concerning pending cases. Canon 20, however, is not a restraint on a newspaper editor or a reporter. During World War II newspapers showed that they could keep secrets well which vitally affected the public interest. However, lawyers, particularly defense counsel, often deeply resent what they regard as deleterious influences on a jury coming from outside the courtroom, especially under the guise of news. Included among such influences are expressions by newspaper editors of their opinions of the guilt or innocence of the accused. Perhaps in a class more to be condemned because more unfair to the

accused is the publication of inadmissible evidence, including "confessions" by the accused. These and similar tactics have been lumped under the misnomer of "trial by newspaper".

The recent *Jelke* case in New York City involving charges of compulsory prostitution against the defendant raised a similar issue. The trial judge in that case excluded newsmen from the trial in a dubious attempt to protect the public morals against obscene and salacious testimony. The defendant's conviction was reversed on appeal because the defendant was denied the right to a public trial. In England newspapers have often felt the sting of the English law concerning what may be termed there as "newspaper contempt of court". American newspapers have been permitted far greater latitude. Editors and reporters here regard many matters as newsworthy which courts, regardless of their fortitude, believe impair fair trials.

The problem, of course, is how far newspapers have a right to go in their reporting and editorializing on current judicial proceedings. When does a "public trial" interfere with the accused's right to a "fair trial"? Which guarantee is to be given priority, the fair trial guarantee of the Sixth Amendment, or the freedom of the press guarantee of the First? The specter of censorship rears its repulsive head. Politics may play a role here, too. The problem is a perplexer!

It is important that all segments of the community be heard on this vital issue. Newspapermen ought to be particularly vocal because they are vitally affected. They still remind members of the Bar that it was a Philadelphia lawyer named Hamilton who won the first great victory for freedom of the American press in Peter Zenger's case. Lawyers and judges must also speak out.

The William Nelson Cromwell Library

■ The William Nelson Cromwell Library in the American Bar Center was dedicated on February 22, shortly after the adjournment of the Midyear Meeting of the House of Delegates. Approximately 125 guests heard introductory remarks by President Loyd Wright and by Robert G. Storey, Chairman of the Research and Library Committee of the American Bar Foundation. Mr. Storey outlined the negotiations with the trustees of the American Bar Association Endowment which resulted in the transfer of the Cromwell bequest of $450,000 to the building fund for the Bar Center. Mr. Cromwell gave this amount to the Association "for its library and/or research and exposition in law."

Mr. Storey presented Harold J. Gallagher, of New York City, representing the trustees. Mr. Gallagher introduced as the speaker for the occasion Arthur H. Dean, personal friend and professional associate of Mr. Cromwell, who gave an interesting account of the life of this noted lawyer. In closing his address, Mr. Dean said: "I hope that in this room and in this building, of which I am sure Mr. Cromwell would have approved heartily, you will be able to make a substantial contribution in framing new structures for a changing society, and I am sure that you will."

The library and research wing of the American Bar Center started its activities the first of the year. John C. Leary, former law librarian and assistant professor of law at Leland Stanford University, is the librarian of the Cromwell Library. Mr. Leary received his A.B. and LL.B. degrees at the University of Utah and was admitted to the Utah Bar in 1941. He was in the Army from 1943 until 1946 as an agent of the Criminal Investigation Division, Provost Marshal General's Corps, stationed in England and France. On his discharge, Mr. Leary went to California and was employed for a short time as a Research Assistant in the San Francisco office of the California Judicial Council. Thereafter he moved to New Orleans where he worked for the government in administrative positions until the fall of 1950, when he became Assistant Librarian in the Law Library at the University of

John C. Leary

Washington. While working there, Mr. Leary took several courses in the library school specifically designed for law librarianship. He went to Stanford University School of Law as Law Librarian in 1951.

Mr. Leary has been active in the American Association of Law Libraries, and has contributed to the *Law Library Journal*. He is a member of Phi Kappa Phi and Delta Theta Phi.

Mr. Justice Harlan

■ On Monday, March 28, 1955, in the traditionally simple ceremony, Judge John Marshall Harlan, of the United States Court of Appeals for the Second Circuit, became Mr. Justice Harlan of the Supreme Court of the United States. He succeeded Mr. Justice Jackson, whose untimely death caused grief to the entire American Bar. He followed in the footsteps of his grandfather, for whom he was named, who was a notable Justice of the Court for thirty-four years prior to his death in 1911.

Born in Chicago in 1899, he must always have been destined for the law and public service which his father, too, followed. Graduating from Princeton in 1920, he studied law at Balliol College, Oxford, as a Rhodes scholar for two years, completing his legal education at New York Law School. Except for periods of other public service, until his appointment to the Bench he was associated with and later a partner of a great New York law firm.

Devotion to public service was encouraged by association with Emory Buckner, who has left a memorable record as a United States Attorney for the Southern District of New York. Harlan served with him as an Assistant United States Attorney where he had broad experience in the prosecution of criminal cases. He served with Mr. Buckner again as Chief Assistant in the state investigation of a sewer scandal in Queens County, resulting in a successful prosecution of an important public fraud.

Harris & Ewing

During his private practice he became one of the leaders of the trial Bar. He appeared in a large number of important cases in state and federal courts, running the full gamut of controversies from will contests to long antitrust trials. A fine trial judge referred to one of his examinations as "a masterpiece of forensic art".

From 1942 to 1944 he served, by urgent invitation, as a key officer with the Army Air Force overseas. There he performed critical functions in improving bombing operations which he also observed repeatedly at firsthand. Promotion to the rank of colonel, receipt of our Legion of Merit and the Croix de Guerre with Palm from both France and Belgium attest the distinction of his service.

In March, 1951, he was drafted as Chief Counsel to the New York State Crime Commission which made a notable contribution in exposing some of the ramifications of professional criminal activity. Serving without compensation, he played a vital role in the accomplishments of this Commission.

In March, 1954, he succeeded Judge Augustus Hand on the Court of Appeals for the Second Circuit. During his tenure he wrote some significant opinions which display a practical grasp and a sure instinct for the jugular of the case.

When he was nominated for the Supreme Court the spokesmen of the organized Bar expressed great enthusiasm. Representatives of the American Bar Association and the New York State and local associations strongly supported confirmation before the Senate Judiciary Committee.

It would be inappropriate to attempt prediction as to the new Justice's judicial course. He comes to the Court superbly equipped for great judicial service. Long a New York lawyer's lawyer and then a Second Circuit lawyer's judge, the entire Bar welcomes another American lawyer's judge.

WHITNEY NORTH SEYMOUR
New York, New York

Rule-Making in New Jersey:

Denial of a Republican Form of Government?

by **Anthony P. Kearns** · *of the New Jersey Bar (Newark)*

▪ This is a discussion of a subject that has been debated extensively for a quarter of a century or more; that is, should the courts have the power to prescribe the rules of pleading and practice? Mr. Kearns, however, is not merely winnowing old straw. The Constitution of New Jersey expressly confers that rule-making power on the state's supreme court, in contrast to the federal judiciary where the Supreme Court makes rules by virtue of an act of Congress. Mr. Kearns suggests that the New Jersey provision may violate the section of the United States Constitution which guarantees to all states a republican form of government.

▪ Following the adoption of a unified system of rules by the Supreme Court of the United States (Section 2, Act of June 19, 1934, Chap. 651; 48 Stat. 1064; 28 U.S.C.; Supreme Court Order of December 20, 1937), it appeared advantageous to have the rule-making power given also to the state courts. The State of New Jersey took the lead in this regard and in fact has gone even farther than the federal plan, for in New Jersey the rule-making power is not granted to the state supreme court by the legislature but directly by the new state constitution adopted in 1947 (Article 6, Section 2, Paragraph 3); the administration of all state courts is also given to the state supreme court. It was thought by many members of the Bar that, just as Congress may enact a law which in effect repeals a court rule, so in New Jersey, particularly as the constitutional provision for court rule-making was stated to be "subject to law", the New Jersey legislature had a balancing power to offset a court rule by a statute, but the New Jersey Supreme Court has held that the legislature has no such right and that the rule-making power is exclusive to the court.

We shall consider this ruling and its legal consequences.

After looking up the definitions of the words "democracy" and "republic", in dictionaries, we see that republic and representative democracy are practically synonymous terms with the outstanding feature that the people choose their own rulers and through such chosen representatives are themselves the government, *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891). Then looking at the Constitution of the United States we find no mention of democracy, but we do find that "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." (United States Constitution, Article IV, Section 4). That is all there is to it. But this guarantee provision has been interpreted as also placing on each state itself the duty of providing a republican form of government, with the presumption that the government of the states as participated in by the people at the time of the adoption of the Constitution was republican in form. *Minor* v. *Happersett*, 21 Wall. 162, 175 (1875). It necessarily follows that the states of the Union have a republican form of government wherein the sovereign power is exercised by the people through elected representatives in the particular form existing in the particular state at the time of admission to the Union.

Now let us go to another part of the Constitution of the United States, Section 1 of Amendment 14, wherein it is stated "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment extends the same protection against arbitrary state action that is offered by the Fifth Amendment against similar federal action. *Hibben* v. *Smith*, 191 U.S. 310, 325 (1903). The Fifth Amendment is a restraint on legis-

lative as well as executive and judicial branches of the Federal Government. *Den ex dem. Murray* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 277 (1856).

Two Kinds of Rights . . . *Absolute and Procedural*

These rights protected by the Fifth and Fourteenth Amendments fall into two classes which we may call absolute rights (substantive rights) and procedural rights or the rights of due process (adjective rights). Thus the inalienable rights of life, liberty and the pursuit of happiness are among such absolute rights, while the rights to trial by jury, to employ counsel, to be faced with one's accusers, to condemnation proceedings before private property be taken for public use, to be heard in one's own defense and so forth are the methods or procedures of enforcing the inalienable rights. The substantive rights usually answer the question *what*, while adjective rights answer *how* or *in what manner*. Adjective rights have great importance for they are the means by which the substantive rights themselves are protected in the individual citizen.

These rights are set out in the law. We shall not digress on a discussion of the definition of law but go directly to consideration of its classification into substantive and adjective law. "The term [law] also includes 'substantive law' which creates duties, rights and obligations and 'adjective law' or the law of procedure, which provides a method of enforcing and protecting such duties, rights and obligations." (25 Cyc. 164; *Black's Law Dictionary; Winberry* v. *Salisbury*, App. Div. 1949; 5 N. J. Super. 30, 68 A. 2d 332; 5 N. J. 240, 74 A. 2d 406; 71 S. Ct. 123, 340 U.S. 877, 95 L. ed. 638). Speaking for the majority of the New Jersey Supreme Court in *Winberry* v. *Salisbury*, Chief Justice Vanderbilt said, "The distinction between substantive law, which defines our rights and duties, and the law of pleading and practice, through which such rights and duties are enforced in the courts, is a fundamental one that is part of the daily thinking of judges and lawyers." The decision in *Winberry* v. *Salisbury* was a construction of the new 1947 New Jersey Constitution's provision regarding the rule-making power of the Supreme Court. This provision as proposed in 1942, but not then adopted, had read "The Supreme Court shall make rules as to the administration of all the courts, and subject to law, as to pleading, practice and evidence in all the courts." (Article V, Section II, Paragraph 3, 1942 Joint Legislative Committee Constitutional Draft). The provision as actually adopted reads "The Supreme Court shall make rules governing . . . subject to law, the practice and procedure in all such courts." (New Jersey Constitution of 1947, Article 6, Section II, Paragraph 3). The question necessarily arises where does evidence go under the wording of the New Jersey Constitution as adopted in 1947? Nor is evidence mentioned in Chief Justice Vanderbilt's decision. Would he have evidence go under substantive law or stay with pleading and practice as the 1942 legislative committee intended and textbook authors hold? (*McKelvey on Evidence*, Hornbook Series 2d Ed. Sections 1 to 4). To include the law of evidence as substantive law does away with the usual meaning of this classification, yet to include the law of evidence in its usual place as part of the adjective law is to do violence to Chief Justice Vanderbilt's distinction and to extend the Supreme Court's rule-making power, not as adopted in the 1947 constitution, but as had been proposed in the earlier but discarded 1942 draft.

The New Jersey legislature has also retained its voice regarding evidence (R. S. 2A:81-1 *et seq.*, effective January 1, 1952), while the Supreme Court has made a rule on the scope of testimony on depositions (R.R. 4:16-2) and on evidence at trials in the police courts (R.R. 8:7-4), but the court rules are otherwise silent regarding evidence in the upper courts. That the phrase "subject to law" means subject to substantive law and not to statute has been strongly endorsed in later decisions. *George Siegler Co.* v. *Norton*, 8 N. J. 374, 86 A. 2d 8 (1952); *Liberty Title & Trust Co.* v. *Plews*, 6 N.J. 28, 77 A. 2d 219 (1950). In *George Siegler Co.* v. *Norton*, the court said "Under the settled construction of Article VI, Section II, Paragraph 3 of the Constitution of 1947, the Supreme Court has exclusive and plenary power to promulgate rules governing practice and procedure in our courts, as distinguished from matters involving substantive law." The distinction in the words of the court is not between substantive law and adjective law, but between "matters involving substantive law" on the one side and "practice and procedure" on the other, which leaves us with the undecided question as to whether in the field of evidence, the court has this same "exclusive and plenary power" or whether the court and legislature share the responsibility or whether omission of the word "evidence" from the constitutional rule-making provision as adopted is of such import as to evince the people's intention to confine evidence in the legislature's hands, particularly in view of the previously proposed but unadopted phraseology of the rule-making provision with the word "evidence" conspicuously expressed therein.

Another distinction to be found in this constitutional provision does not appear to have been noticed. Is this rule-making power confined to rules and not to regulations or statutes? The Constitution provides that "the Supreme Court shall make rules" but it does not say "the Supreme Court shall make rules, regulations and statutes". On this distinction, it may be argued in much the same manner that "subject to law" is reasoned to be subject to substantive law and not to statutory law, that where the subject matter is proper to a rule the jurisdiction is exclusively that of the court, but where the subject matter may be one for statute the legislature may enact the law. However, in view of the court's asserted "exclusive and plenary power" in the realm of practice

and procedure, we do not believe this distinction as to what may be proper to rules and what may be otherwise promulgated will stand. Consequently, all that may be voiced by statute pertaining to practice and procedure is to be enacted by rule. In other words, whether we like to say it or not, the court has the legislative power in all matters in this particular field, for the legislature has no power, and what the legislature formerly did by statute in the field of remedial or adjective law is now done by the court by rule adoption, at least as far as the *Winberry* v. *Salisbury* case is interpreted to go. Hence, the legislative function in the realm of practice and procedure has solely in the court's exercise of this either ceased to be or is contained sovereign power, under which there has been produced a volume of rules containing some 625 pages of technical instruction on "practice and procedure" with 126 more pages of forms.

Winberry v. Salisbury . . . *The Court Enacts the Law*

Former Chief Justice Case in his minority opinion in *Winberry* v. *Salisbury* said:

> The whole drift of thought and events leads directly to the conclusion that the word "law" in the phrase "subject to law" includes statutory law within its application and, if our effort is to find the actual meaning which the words, as written, were intended to convey, that there is nothing to justify the limitation implicit in the word "substantive" and Judges are men, with very much the same virtues and faults as other men; and, taking men by and large, particularly men in public office, it has rarely been found wise, in the long run, to vest them with power upon which there is no check. Our American conception of constitutional government is one of checks and balances. If the governor exceeds his limitations, if the legislature goes beyond its powers, the courts are available to enforce the constitutional restraints. But if our Supreme Court exceeds its powers, who shall impose the check? Therein lies the danger when the court undertakes, not to construe law, but to make it.

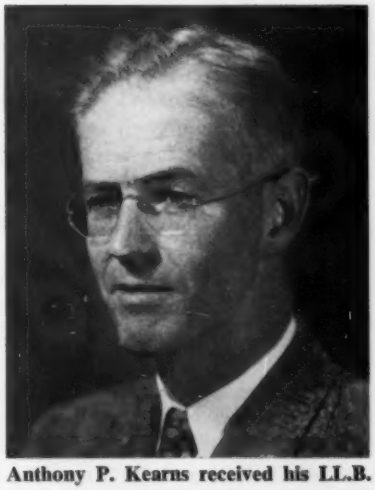
And back in 1932, our same Justice Case also said: "But that appeal should be made to the legislature. To make it here is to confuse the legislative and the judicial functions. It is our part to find, announce, and apply the law, not to make or to change it." *State* v. *Levine*, 109 N. J. L. 503, 162 Atl. 909 (1932). Today the court states that it has the exclusive right and duty to make and change the law pertaining to practice and procedure, and so, although called rule making, it is in effect legislating.

Under the doctrine of *Winberry* v. *Salisbury* from our previous discussion, we can only conclude that laws of practice and procedure are exclusively in the hands of men who are not elected by the people and who have life terms of office (1947 New Jersey Constitution, Article 6, Section VI, Paragraph 3 and Article 11, Section IV, Paragraph 1). While great good may actually be accomplished in placing such power in the competent and worthy hands now represented by the present members of the court, our republican doctrine of government by law and not by men must not be violated even for momentary advantage.

Prior to 1947, the New Jersey legislature was the body entrusted with the task of making the law of due process, including practice and procedure (R. S. 2:1-1 *et seq.*); even court rules were enacted by the legislature (Practice Act of 1903 as amended by P. L. 1912, chapter 231, Schedule A) and this was the law in New Jersey even back to the time it was one of the thirteen original colonies. The then Supreme Court in 1805 vacated its previous rules as superseded in whole or in part by act of the legislature. (1 N. J. L. 5). Therefore, the control of due process, including the law of practice and procedure, was then within the domain of legislative enactment which was capable of superseding any rule made by the judiciary. That was the constitution (in the British sense) of the government of the State of New Jersey when it adopted its first written constitution on July 2, 1776.

Today under the doctrine enunciated in *Winberry* v. *Salisbury*, control of due process within the terminology of "practice and procedure" is not subject to the voice of the elected representatives of the people of New Jersey. *Duncan* v. *McCall*, 139 U. S. 449 (1891). However, this matter of the guarantee by the United States to every state of a republican form of government has been settled as political and not judicial in character, so there is no recourse to the federal courts on this question. *Ohio* ex rel. *Bryant* v. *Akron Metropolitan Park District*, 281 U.S. 74, 50 S. Ct. 228 (1930); *Highland Farms Diary* v. *Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. ed. 835, affirming (D.C.) 16 F. Supp. 575 (1937).

There is little thought to be wasted on an attempt to restore pure republican government to the State of New Jersey by act of Congress. Nor is the solution a strong legislature in New Jersey. Deliver us from a strong legislature, from a strong governor and from a strong court! What is needed is a balanced government with checks on otherwise unrestrained power in any of its di-



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visions. While it is an improvement and a step forward to put court administration and adoption of the rules of procedure and practice in the court, it is not well to have, in a single branch of government, all powers of constitutional and statutory interpretation, plus the dual powers of exclusively making and also interpreting the methods of procedure under which all these powers are controlled without any check or rein by any other branch of the government, particularly if the voice of that branch, which is made up of the directly elected representatives of the people, is silenced. It is never wise to violate fundamental principles.

DEPARTMENT OF COMMERCE 1955 SURVEY OF INCOME IN THE LEGAL PROFESSION

■ The Office of Business Economics of the United States Department of Commerce has been conducting another survey of the legal profession during the month of April. Questionnaires were sent to approximately 25,000 lawyers throughout the United States who were asked to provide summary data on income and costs of practice. This is the first large-scale survey since 1948 when approximately 20,000 lawyers were contacted. The 1948 survey resulted in a fund of much needed information on the status of the legal profession in this country.

As in the past, response to the survy is strictly voluntary and the anonymity of those responding will be safeguarded. Due to the growing awareness of many lawyers that information on the economic status of the legal profession is of value to the profession itself, response to similar surveys in the past has been highly satisfactory.

The purpose of this brief announcement is to explain the nature of the survey and to invite the cooperation of the profession at large. Since the results of such a study are of mutual value to both the profession and the Department, co-operation with the American Bar Association has been particularly close. The American Bar Research Center and the Survey of the Legal Profession have entered fully into the formulation of plans and in the preparation of the questionnaire. The data requested go beyond the immediate needs of the Department primarily to provide information of special interest to the profession.

The Department's immediate purpose in conducting the survey is to carry forward its estimates of the national income in the United States, pursuant to instructions from the Congress. In the construction of these estimates a wealth of statistical information from a variety of sources is utilized. Data of a satisfactory character on the incomes of persons engaged in the various professions can be obtained only by asking the professions themselves to furnish the desired information.

The data obtained throw much needed light on the economic status of the professions studied. They make it possible, for example, to compare earnings among the various professions, to note the trend in the average level of earnings within the professions, to examine whether such earnings have kept pace with increased living costs, to observe what differences in average earnings exist as between the various regions and states of the country, to determine average levels of costs of practice, and to relate earnings to such factors as age and type of practice. Not the least of the advantages gained is that the individual practitioner is enabled to appraise his own position in the profession with regard to costs and earning power.

The publication of the results of the previous study carried out in 1948 yielded just this type of information. Tables were provided, for example, which gave information on the earnings of lawyers and their variation around a mean value; gross income and the per cent of such income remaining after costs of practice are paid; breakdowns of costs into major categories; the relative earnings of lawyers with private individual and business clientele; earnings from salaried and nonsalaried practice; the average income of lawyers arrayed by size of firm and size of community; and the relation between income and such factors as age and years of practice.

The design of the study is basically simple. The profession is too large to permit a survey of all persons engaged in law practice, but a suitably selected sample of 25,000 will provide a reliable basis for the data required. This implies that approximately one in eight lawyers presently in practice will receive questionnaires. In some instances questionnaires will be received by a number of members of the same law firm. In such cases each recipient is urged to respond irrespective of the fact that others have received the questionnaire. It is the only way that the final results can be suitably weighted and made to yield reliable summaries.

As will be evident from the questionnaire and the covering letter which the profession will receive, the study will be conducted so as to assure the complete anonymity of the returned questionnaires. Also the information furnished to the Department will be used only in combination with other data to calculate over-all summary figures such as totals and averages. The returned questionnaires themselves will not be available to any other agency.

The American Bar Association and its affiliated organizations join with the Department of Commerce in urging every lawyer who receives a questionnaire to answer the questions as carefully and as fully as possible so that reliable data will be obtained which will accurately reflect the practice of law in this country. They also urge members of the Association to inform other lawyers of their acquaintance who may not have seen this announcement of the plans for the forthcoming study and its importance to the profession.

Lawyers and Accountants

■ The report of the Committee on Professional Relations to the House of Delegates at the mid-year meeting, which appeared in the April JOURNAL, referred to an answer to *Helping the Taxpayer*, a booklet published by the American Institute of Accountants. This answer follows. It should be considered with the Statement of Principles approved by the American Institute of Accountants and American Bar Association in 1951. It is recognized that this statement did not attempt to define what constitutes the practice of law or the practice of accounting. For the "guidance of the members of each profession" it set forth "a statement of principles relating to practice in the field of federal income taxation". It deals with the functions of both lawyers and accountants in this field, and recognizes that "the principal purpose is to indicate the importance of voluntary cooperation between our professions, whose members should use their knowledge and skills to the best advantage of the public".

Since the mid-year meeting of the House of Delegates, representatives of the American Institute of Accountants and of our Association have held another meeting, but thus far have been unable to reach an agreement. The negotiations have been conducted with mutual good will and good faith. The discussions have resulted in a clearer understanding of the position and problems of both organizations.

It is apparent that a mutually satisfactory agreement would be possible except for one issue, *i.e.*, the proposal of the Institute to amend Treasury Circular 230 with respect to the scope of tax practice of enrolled agents before the Treasury Department.

Section 10.2(b) relating to the scope of tax practice before the Department reads as follows:

> **Practice before the Treasury Department shall be deemed to comprehend all matters connected with the presentation of a client's interests to the Treasury Department, including the preparation and filing of necessary written documents, and correspondence with the Treasury Department relative to such interests. Unless otherwise stated the term "Treasury Department" as used in this paragraph and elsewhere in this part includes any division, branch, bureau, office, or unit of the Treasury Department, whether in Washington or in the field, and any officer or employee of any such division, branch, bureau, office, or unit.**

Section 10.2(f) relating to the rights and duties of agents, reads:

> **An agent enrolled before the Treasury Department shall have the same rights, powers, and privileges and be subject to the same duties as an enrolled attorney: Provided, that an enrolled agent shall not have the privilege of drafting or preparing any written instrument by which title to real or personal property may be conveyed or transferred for the purpose of affecting Federal taxes, nor shall such enrolled agent advise a client as to the legal sufficiency of such an instrument or its legal effect upon the Federal taxes of such client: And provided further, That nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.**

The American Institute of Accountants does not advocate the deletion of the last clause of 10.2(f), as originally suggested, but has proposed that the Treasury Department be urged to "add the following clause at the end of the first sentence in Section 10.2(b): 'and nothing in the regulations of this part shall be construed as limiting such scope of practice by enrolled agents', or such other language as will make it clear that certified public accountants and other enrolled agents may engage in practice as described in Section 10.2(b)."

The House of Delegates is on record as opposing the elimination of the last clause of Section 10.2(f). It is the position of the Association that the amendment of Section 10.2(b) proposed by the American Institute of Accountants would have the effect of nullifying this clause. Thus far the negotiating committees have been unable to agree upon any other language which would satisfy the Institute's position that the scope of practice under 10.2(b) should be unlimited, and the Association's position that the force of 10.2(f) should not be diluted. The Association, of course, is firm in its view that the practice of law must be regulated by the several states.

Both organizations agree that differences should be resolved by agreement and conference rather than by litigation. The Association's representatives have expressed a willingness to co-operate in establishing a permanent joint conference to formulate rules and standards to render more specific the general terms of the Statement of Principles, and in recommending and encouraging the establishment of local joint conferences in all states and principal cities.

The Institute feels that such cooperative machinery would not prevent litigation in state courts unless Section 10.2(b) is amended in accordance with its proposal. It presently takes the position that such an amendment of Treasury Circular 230 is a condition precedent to effective cooperative action.

It is the position of representatives of the Association that effective machinery can and should be established at the national, state and local levels and that any amendment to Treasury Circular 230 is unnecessary. On the other hand, we are not adamant against revision of Section 10.2(b) to delineate more clearly the authority of enrolled agents in tax practice before the Treasury Department, provided any such revision does not have the effect of nullifying the last clause of Section 10.2(f).

The foregoing is a brief summary of the present status of the negotiations. I have not attempted to review the other points which can easily be resolved if a solution can be found for this issue. I am sure the members of our committee will appreciate suggestions and comments from members of the Association.

Whether or not we arrive at a definitive agreement, the Committee on Professional Relations recognizes the importance of maintaining a cordial relationship with the American Institute of Accountants and its chapters, and is anxious to promote cooperative action between the two.

W. J. JAMESON,
Chairman

▪ A booklet entitled "Helping the Taxpayer" has recently been published and distributed by the national organization of certified public accountants. This published material incorrectly states the position of the legal profession concerning the proper activities of lawyers and accountants in tax practice. In addition, it fails to state correctly the nature of federal tax problems and the procedures involved in the disposition of tax controversies.

It is regrettable that the booklet and other material published by the American Institute of Accountants fail to inform the public and the members of the Institute as well, of the agreement which was entered into in 1951 between the American Bar Association and the Institute as to the proper roles of lawyers and accountants in advising and representing taxpayers. This failure, which is difficult to understand, creates "confusion" where none exists. The public is asked to form a judgment on an incomplete statement of the facts.

The purpose of the present statement is to set the record straight as to the true nature of federal tax problems and the remedies available to taxpayers. It is also intended to state the position of the American Bar Association as to the respective roles of lawyers and accountants in advising and representing clients with respect to tax matters.

Tax practice covers many different types of federal, state and local taxes, including income, estate, inheritance, gift, franchise, sales, excise and real estate taxes—to name but some. The comments herein made will be directed toward federal income taxation since the problems arising therefrom are of the most general interest. However, much of what is said about assisting taxpayers with respect to federal income tax matters will have equal application to the other types of taxes.

Tax matters may involve questions of law, questions of accounting, or both. The American Bar Association and the American Institute of Accountants in 1951, after long consideration, entered into a Statement of Principles defining the proper roles and functions of lawyers and certified public accountants in the field of federal income taxation. [This Statement of Principles was published in the July, 1951, issue of the JOURNAL (37 A.B.A.J. 517) and in the November, 1954, issue (40 A.B.A.J. *insert,* page iii) .] Attention is invited to its provisions. This Statement of Principles defines the respective roles of the lawyer and the accountant in tax practice, not from any selfish standpoint of the respective professions, but from the standpoint of which profession can best serve the taxpayer in a given situation. It is difficult to see how a claim of "current confusion" in the matter of tax practice can be made by the Institute, since the answer as to the proper role of lawyers and accountants in almost any area of tax practice can be found in the Statement.

The Statement of Principles clearly recognizes that in certain areas of tax practice the interests of the client are best served by the professional skills of the accountant. However, when the client's problem involves the application of *legal principles,* the client will be best served by a lawyer. In some situations, the nature of the problem is such that the skills of both professions are required. The taxpayer, of course, is interested only in having the best possible professional assistance in resolving his tax problem, and this objective was what the two professions had in mind at the time they promulgated the Statement of Principles.

Advocacy versus Fact-Finding

The lawyer's role is to advise his client with respect to the legal principles—whether contained in statutes or administrative regulations or developed through court decisions—applicable to the client's cause, and to defend or espouse that cause by argument. The defending or presenting of a client's case by argument is known as the art of advocacy. To prepare for it, the lawyer must meet high standards of legal education and training. The term "practice of law" embraces not merely the conduct of litigation, but the furnishing of advice or service requiring the use of legal knowledge or skill.

The role of the accountant, on the other hand, is that of an impartial expert fact-finder, who reports and certifies accounting facts and figures, and counsels on accounting methods, procedures and principles. "It is the peculiar obligation of the certified public accountant, which no other profession has to impose on its members, to maintain a wholly objective and impartial attitude toward the affairs of the client whose financial statements he certifies." (Carey: "Professional Ethics of Public Accounting", page 13). In this role, the certified public accountant has rightly attained a respected position in the business world.

It boils down to this—a lawyer should not perform accounting work for the client because he does not have the necessary training to give the client the best assistance in this field. By the same token, the accountant should not undertake to do legal work for the client, whether in advising as to the possible tax effects of transactions, in connection with the preparation of the tax return, or after the return is filed, because the accountant does not have the technical training or experience to do the work of the lawyer.

What Is Tax Law?

The material published by the American Institute of Accountants is misleading in that it seeks to give the impression that the determination of the taxable income of most businesses and many individuals is usually only "a matter of complex accounting judgments" which can in most instances be resolved by informal discussions with representatives of the Internal Revenue Service. The taxpaying public is *not well served by this failure to recognize* the many legal problems which may be involved.

The fallacy in the Institute's suggestion that the preparation of tax

returns, as well as the advising and representing of clients in tax matters generally involves nothing more than accounting problems, is that the Internal Revenue Code is a law enacted by Congress like any other federal law, and that the questions arising under many of its provisions are questions of law and not questions of accounting.

The Interrelationship of "Tax Law" and General Law

The term "tax law" may be applied somewhat loosely to that body of law which is concerned with the tax effects of transactions and activities engaged in by the taxpaying public. "Tax law" is not a field of law separate and apart from the general body of law. It is not a unique or isolated subject enclosed by four walls labeled "The Internal Revenue Code", "Treasury Department Regulations", "Treasury Rulings" and "Accounting Principles". It cuts across virtually all branches of law and weaves in their principles. A thorough knowledge and understanding of basic legal concepts, legal processes and the interrelation of law in all its parts is essential to the practice of law in any of its branches, including the broad area sometimes referred to as tax law.

The general law of the forty-eight states is interwoven in the body of federal tax law. The laws of the respective states with respect to corporations, partnerships, trusts, wills and estates, gifts, agency, real and personal property and even divorce, to name but some fields of law, must ofttimes be applied in getting the answer to a federal tax question. Likewise, even though a transaction may have a nice and tidy result from a federal tax standpoint, consideration must often be given to the impact of state law on the transaction or the obligations incurred thereunder. This fact is all too often overlooked by those who would carve out an area of so-called tax law and seek the answers to all questions in the Internal Revenue Code or the Treasury Department regulations and rulings.

When Should Legal Advice Be Sought?

In discussing the preparation of income tax returns and the settlement procedures available for the disposition of disputed items by agreement with the Internal Revenue Service, "Helping the Taxpayer" seeks to leave the impression that there is no occasion to consult a lawyer until attempts at administrative settlement have failed and the taxpayer decides to resort to court action; in short, the argument runs that "law and precedents" are unimportant considerations prior to the filing of suit, and that administrative settlement negotiations are mere "consent proceedings" where the parties engage in horse-trading—seeking a settlement on a dollar figure that bears no relation to legal issues.

On the contrary, the facts are:

Preparation of Returns.

The assembling and verification of the facts dealing with the income producing activities of the taxpayer, which include the marshaling of data previously recorded in the taxpayer's books and records, and their proper reflection in the income tax returns of the taxpayer, are by the very nature of the services and skills involved generally in the field of accounting. In many cases the statutory requirements are clear and no legal skill is necessary to understand and comply with them.

However, there are many other cases when the determination of tax liability from the assembled facts involves a substantial legal question. Here the skills and services called for are those of the lawyer. The difficulty arises when the accountant takes on the function of the lawyer in such cases.

Typical of instances where substantial legal questions may be involved in such a determination, and which obviously call for legal skills rather than "complex accounting judgments", are the following:

(1) May minor children be treated as members of a partnership for federal tax purposes?

(2) Under what circumstances are payments by a divorced man to his former wife deductible in the computation of his taxable income?

(3) Does the forgiveness of a debt result in taxable income to the debtor?

(4) Is a given corporate instrument a debt instrument or an equity instrument?

(5) Should the capital gains of a trust be taxed to the life tenant or to the remaindermen?

(6) Does a merger or consolidation qualify as a reorganization under which an exchange of securities is tax-free?

Numerous illustrations like the foregoing could be given. These are cited merely as examples of situations where the preparation of a return may involve a substantial legal question.

If a tax return presents questions of law, it is to the taxpayer's interest that the advice of a lawyer, trained in statutory interpretation and in all the fields of law which might bear on the problem, be obtained before the return is finally prepared and filed. It is just as important to the taxpayer that the correct answer be found at this stage as it is to have proper legal advice and representation at the time when he "takes his case to court". This is recognized in the Statement of Principles.

If proper legal advice is not obtained in such a case before the return is filed, the penalties may be substantial. Tax deficiencies carry the high interest rate of 6 per cent. If the error results in an overpayment of tax, the Treasury Department is apt to be quite reluctant to make a refund and the taxpayer may have to initiate costly court proceedings to recover the excess.

Treasury Negotiations.

When the Internal Revenue agent indicates that in his judgment additional tax is due and owing, that determination will usually be based upon a rule of law. The agent does not pull a proposed tax deficiency out of the air. That issue of law must be met at the outset with the agent and, if he is not convinced, at

every step of the succeeding administrative negotiations. Far from being "consent proceedings", where the parties are seeking a "fair" guess as to the proper dollar amount of tax liability, the taxpayer must meet the issue raised by the examining agent and persuade the reviewing officials that the agent has applied an erroneous rule of law. Whether the Treasury representatives are accountants or lawyers, the proper and best presentation of the client's case to the Treasury Department representatives requires the use of the lawyer's skill in the art of advocacy just as much as does any court proceeding. The informality of the Treasury Department proceeding should not mislead anyone as to the true nature of the proceeding. Whether the taxpayer's case is being considered by the Treasury Department or by a court, the fundamental issue is the same, namely, what is the correct tax liability?

Of course, if a problem of accounting methods or application is involved, the services of an accountant should be obtained so as to insure the proper development of the facts and accounting theories involved. The legal and accounting professions in the Statement of Principles have recognized the proper roles of the lawyer and the accountant in settlement negotiations with the Treasury Department and the members of each profession have an obligation to advise the client as to the type of representation which a particular situation may require.

In short, the *nature* of the issue should determine which technician is best equipped to meet it. But the issue itself must be met. The Internal Revenue Service is not authorized to settle these controversies on some vague concept of fairness and equity, and it will not do so. The taxpayer must convince the Government representatives that, as a matter of law or of sound accounting, he is right. The final outcome of the controversy may well depend not only upon the nature of the issue, but the way in which it is met at the outset.

The rules of practice before the Appellate Division of the Internal Revenue Service provide that "The Conferee, in his conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction." The administrative officials of the Internal Revenue Service do not operate independently of legal advice. There is a large staff of lawyers in the office of the Chief Counsel, many of whom are stationed at local regional offices of the Service. Many matters are referred to these government lawyers for legal review and advice before final action by the administrative officials who are dealing with the taxpayer.

Another element in the presentation of a taxpayer's case which must be considered is the necessity of marshaling and proving *all* of the material facts. Before entering into settlement negotiations with the Treasury Department, the taxpayer's representative should analyze all of the law bearing on the case. This involves analyzing the Internal Revenue Code as well as other pertinent federal laws and the state laws. In doing this, it will be necessary to read the court opinions which have interpreted these statutory provisions. Treasury Department regulations or rulings will also be considered in this analysis. This background of law guides the taxpayer's representative in determining the facts which must be developed in order to bring about the proper disposition of the taxpayer's case. In presenting the case to the administrative officials the taxpayer's representative must necessarily proceed in much the same manner as in presenting a case to a court or jury. The difference between presenting a case to the Treasury Department and to a court or jury is merely a difference in technique; it is not a difference in substance.

A vital consideration in deciding whether a settlement should be made is that the determination of the administrative officials will be presumed to be correct and the taxpayer, in court, will have the burden of overcoming that presumption. In making that decision, a lawyer is qualified by training and experience to recognize what evidence will be admissible in court, in the event of litigation.

The Disposition of Tax Controversies by Court Action.

If the Internal Revenue Service will not settle a controversy on a basis satisfactory to the taxpayer, the taxpayer has a choice of alternatives in submitting the dispute to judicial determination:

THE TAX COURT. Where the taxpayer desires to defer the payment of any additional tax demanded by the Treasury Department until after the matter has been passed upon by a court, he can appeal to the Tax Court of the United States. The pamphlet "Helping the Taxpayer" incorrectly reflects the character and function of the Tax Court. It suggests that the Tax Court is not really a court, but a "referee", with authority to render any decision it considers fair. This is an inaccurate picture.

The Tax Court, while technically a part of the executive branch of the Government, is a court in every sense of the word. Its powers are wholly judicial in character. It is bound by the same rules of evidence and of judicial due process as are other federal courts; it may decide only the issues which are formally presented to it in the pleadings filed; and its decisions are reviewable, just like decisions of the United States district courts, by the United States courts of appeals and the Supreme Court. The preparation of a petition to the Tax Court requires the same skill as does the preparation of a pleading in any other court. The trial of a case before it may be safely entrusted only to a lawyer, who is trained in the art of pleading, in the rules of evidence, and in the proper marshaling and presentation of the evidence pertinent to the issues. In this connection it is important to note that the decisions of the Tax Court are reviewed by the courts of appeals and the Supreme Court only

(Continued on page 472)

The New Revenue Code:

Pension and Profit-Sharing Plans

by **Leon L. Rice, Jr.** • *of the North Carolina Bar (Winston-Salem)*

▪ This article is another of a series that commenced in the November, 1954, issue on the 1954 Internal Revenue Code. The articles are written by members of the Section of Taxation, who worked closely with Congress during the development of the new Code, as a service of the Section of Taxation to the members of the American Bar Association. The articles are prepared under the supervision of the Section's Committee on Publications, John W. Ervin, Chairman. The Committee solicits comments from readers on the value of the articles to them. Letters mailed to the Editor-in-Chief of the Journal will be forwarded to the Committee.

▪ Liberalization is the keynote of the changes affecting pension and profit-sharing plans made by the Internal Revenue Code of 1954. All but one have to do with income taxes, the exception being a significant but somewhat obscure estate tax provision. On the distaff side are the subjection of employee trusts to the "prohibited transaction" and "unrelated business income" provisions which have been previously applicable to charitable organizations.

The practitioner experienced in this field under the 1939 Code will take time to get used to the fact that the familiar Section 165 has become Sections 401 and 402 of the 1954 Code, and Section 23 (p) is now Section 404.[1]

Taxation of Employee Benefits

In the case of a qualified-trusteed plan, the prior law provided for long-term capital gain treatment of distributions as a result of separation from service if paid entirely within one taxable year of the distributee. Such treatment was available to a beneficiary of a deceased employee if employment was terminated by death. It was not available, however, if the distributions were received after retirement under the plan had become effective. In no event did the old law extend the capital gain benefit to distributions under a nontrusteed plan.

The new Code cures both of these inequities. It permits capital gain treatment of distributions made on account of the death of the employee after his separation from service, assuming, of course, that they are paid within one taxable year of the distributee.[2] It also makes the capital gain provisions applicable to annuity plans which are administered without the use of a trust.[3]

Both the 1939 and the 1954 Codes provide that periodic distributions under a contributory plan—that is, one where the employee has made contributions—shall be taxed as annuities.[4] However, the new Code replaced the old three per cent rule with a new method of taxing annuities.[5] Under this new method, the employee excludes from taxable income each year an amount equal to the total of his contributions divided by the number of years the annuity is to be payable, that is, his life expectancy if a life annuity, or a fixed number of years if an annuity for a term certain. The balance of the distributions received during the year is included in taxable income. Special provision is made with respect to an employee-benefit plan in the case of an employee whose total benefits within the first three years will equal or exceed his contributions.[6] In such event, all benefits received are excluded from income until the total contributions made by the employee are recovered, and thereafter the benefits are fully taxable. The new Code continues the general rule that the beneficiary of a deceased employee who receives periodic payments is taxed in the same manner as the employee would have been taxed. Two important exceptions to this general rule are that life insur-

1. The less familiar Section 22(b)(2)(B), relating to the taxation of employees' annuities, is now Section 403.
2. 1954 I.R.C., Sections 402(a)(2) and 403(a)(2)(A).
3. *Ibid.*, Section 403(a)(2).
4. 1939 I.R.C., Sections 165(b) and 22(b)(2); 1954 I.R.C., Sections 402(a)(1) and 403(a)(1).
5. 1954 I.R.C., Section 72.
6. *Ibid.*, Section 72(d).

ance benefits are exempt, and that the $5,000 exclusion, discussed below, may be applicable.

The $5,000 exclusion from income provided by Section 22 (b) (1) of the 1939 Code was held to be applicable to death benefits under a pension or profit-sharing plan only to the extent that the rights of the employee were forfeitable before death. A vested amount which the employee could have received while living was not subject to the exclusion. The 1954 Code provides that the exclusion applies to death benefits, regardless of whether the employee had a vested right before his death, provided the total benefits are paid within one taxable year of the distributee.[7] Where such requirements are met, therefore, a beneficiary who receives more than $5,000 may exclude the first $5,000 from income and treat the excess above $5,000 as a long-term capital gain.

The income tax credit based on retirement income which was added by the 1954 Code[8] is unlikely to be of great benefit as regards distributions under pension and profit-sharing plans where the recipient receives substantial Social Security payments. This credit is available at the lowest tax rate (now 20 per cent) on retirement income up to $1200 a year. The recipient must have reached age 65 before the end of his taxable year.[9] Any Social Security pension is deducted from $1200 in computing the base for the credit.[10] This deduction will materially reduce, and in some cases eliminate, the credits of employees covered by Social Security.

Section 2039 (c) of the new Code would exclude from the estate of a deceased employee the value of an annuity or other payment receivable by the employee's individual beneficiary under a qualified plan, except for the portion of the value attributable to the employee's own contributions. This applies to employees dying after December 31, 1953, and notwithstanding any other provision of law. The meaning of this provision is not clear, particularly as it relates to the words "other payment". Does it include payments stemming from life insurance on the life of the deceased employee?[11] Does it include lump sum or periodic distributions under a profit-sharing plan? These are questions which may be answered by the forthcoming estate tax regulations and, if not answered there to the satisfaction of taxpayers, the courts may be called upon to supply the answers.

Employer Contributions . . . *Deduction Provisions*

The new Code leaves virtually undisturbed the rules of old Section 23 (p) about the *deductible amounts* of contributions under pension and profit-sharing plans. It does, however, liberalize in other respects the deduction provisions.

The rather rigid sixty-day provision applicable to accrual basis employers under the 1939 Code has been extended and made more flexible as to the time limit. The new provision permits an accrual basis employer to accrue a contribution under a pension or profit-sharing plan as of the last day of the employer's taxable year and to deduct it, within the prescribed limits as to amount, if actually paid by the due date for filing the income tax return of the employer for the taxable year.[12] This includes duly authorized extensions of time for filing the return. Thus, all accrual basis employers are afforded the opportunity of making their contributions by the fifteenth day of the third month following the end of the taxable year and, if one or more extensions are obtained, the payment may be made at any time within the extended period. This new provision, however, does not eliminate the existing requirement, in the case of a newly established employee trust, of making a payment to the trustee within the taxable year in an amount sufficient at least to make the trust a valid one under local law. A token payment will presumably suffice for this purpose. Cash basis employers must still make full payment of their contributions within the taxable year, irrespective of whether the trust is new or old.

Where, under a qualified plan, an amount is contributed in excess of that deductible for the taxable year, a carry-over deduction to a subsequent year or years is created in favor of the contributing taxpayer. The new Code provides that in the case of a tax-free liquidation of a subsidiary or a tax-free reorganization, the carry-over deduction of the contributing corporation may be utilized by the acquiring or successor corporation.[13]

The former law permitted two or more corporations to have a common profit-sharing plan, but even though they were affiliated corporations who could file a consolidated return, each corporation could make a contribution and obtain a deduction only if it had current (or possibly accumulated) profits. No other corporation in the group could contribute for the deficient corporation and get a deduction. The new Code alleviates this situation where affiliated corporations are involved.[14] If any member of the group cannot make a contribution because it has no profits or because the profits are less than the contribution which otherwise would be made, the other members which have profits may contribute in behalf of the deficient corporation. If a consolidated return is filed, the contributing members may divide the contribution in any way they elect. If a consolidated return is not filed, each profitable member may contribute and deduct only an amount which is in the same

7. *Ibid.*, Section 101 (b) (2) (B).
8. *Ibid.*, Section 37. Retirement income includes pensions and annuities, interest, rents, and dividends, in all cases to the extent includible in gross income.
9. Another requirement is that he must have received in each of any ten previous calendar years (not necessarily consecutive) earned income of more than $600.
10. If he has not reached age 75 before the end of the taxable year, any amount of earned income in excess of $900 received by him during the year is likewise deducted from $1200.
11. The Senate Finance Committee Report, speaking about Section 2039 generally, states that it does not apply to life insurance. This may make it important to see that the employee does not have, directly or indirectly, any incidents of ownership in the policy, such as the right to change the beneficiary.
12. 1954 I.R.C., Section 404 (a) (6).
13. *Ibid.*, Section 381 (c) (11).
14. *Ibid.*, Section 404 (a) (3) (B).

ratio to its current and accumulated profits after its own contribution has been made as the prevented contribution is to the total current and accumulated profits of the profitable members after all of their own contributions have been made. Each contributing member may deduct the contribution it makes, assuming it is within the permissible limitations as to amount and would have been deductible by the deficient member if it had been able to make the contribution. In determining a credit carry-over of the loss member—that is, a credit arising where less than 15 per cent of the compensation of the participating employees of the loss member is contributed for a particular year—contributions made by the profitable members are treated as if made by the loss member.

Trust for Tax Exemption . . . *Qualification Requirements*

The requirements for initial qualification of a pension or profit-sharing plan were virtually unchanged by the new Code. In order to be exempt, it is now necessary for an employee trust to be created or organized in the United States. However, the tax treatment of contributions to and distributions from foreign trusts is the same as in the case of domestic trusts.[15]

Under a restrictive provision added by the 1954 Code, a qualified trust will lose its exemption if it engages in a "prohibited transaction".[16] Such a transaction would ordinarily involve a transfer of money, property or services between the trust and the employer or a corporation controlled by the employer which is not a fair, arm's-length transaction as regards the trust. Included within the category of prohibited transactions are a loan of trust funds to the employer without adequate security and a reasonable rate of interest, and buying or selling securities or other property in a transaction between the trust and the employer for a price which is to the detriment of the trust. A loss of exemption resulting from a prohibited transaction has serious tax consequences: (a) the trust income becomes taxable; (b) the employer loses its right to deduct contributions, unless the employees' rights are fully vested; (c) the employees will be taxed currently on contributions in which their interests are vested; and (d) capital gain treatment is not available with respect to any distributions to employees or beneficiaries. A loss of exemption can occur, however, only after the Treasury Department has notified the trust that it has engaged in a prohibited transaction. The adverse tax effects are ordinarily prospective—that is, they operate only with respect to taxable years subsequent to the taxable year in which the notice is given, unless there was an intentional diversion of corpus or income which involved a substantial part of corpus or income of the trust. Provision is also made for reinstatement of the exemption upon application to the Treasury Department if the Department is satisfied that the trust will not knowingly again engage in a prohibited transaction. The reinstatement is likewise prospective.

Although the Treasury Department took the position under the former law that an employee trust which engaged in the conduct of an active business was subject to tax on the income realized from such a business, there was no provision in the Code specifically covering this matter. The 1954 Code provides that an otherwise-exempt trust will be subject to tax on income from the active conduct of a trade or business (including partnership income), or from a "business lease".[17] A business lease is a lease of real property, or personal property if leased in connection with real property, with respect to which the trust-lessor is indebted at the end of the taxable year. It must be a lease for more than five years, including extensions and renewals. Protective provisions assure that the substance rather than the form of the term of a lease will govern in determining whether the lease covers more than five years. If the lease qualifies as a business lease, the rents received by the trust are taxed in the same proportion that the debt on the property bears to the adjusted basis of the property as of the end of the taxable year. Accordingly, after the debt is retired, the rents are not taxable. Business lease indebtedness incurred in connection with property leased before March 1, 1954, is not subject to this new provision.

Ray W. Goodrich

Leon L. Rice, Jr., is a member of the Bars of North and South Carolina. A member of a firm in Winston-Salem, he was Secretary of the Section of Taxation from 1949 to 1952, and was Chairman of the Section's Committee on Pension and Profit-Sharing Trusts from 1952 to 1954.

A pension or profit-sharing trust must now file an annual information return, stating specifically its items of gross income, receipts and disbursements, and such other information as may be prescribed by the Treasury Department, except that the Department may relieve the trust from stating in the return any information which is reported in returns filed by the employer which established the trust.[18] Thus, by requiring the filing of a return, an employee benefit trust can take advantage of the statute of limitations with respect to any income tax liabilities which it may have incurred beyond the bar of the statute.

Although the pension and profit-

15. *Ibid.*, Sections 404(a)(4) and 402(c).
16. *Ibid.*, Section 503.
17. *Ibid.*, Sections 511-15.
18. *Ibid.*, Section 6033.

sharing provisions of the 1954 Code fell short of the goal set by the Ways and Means Committee of the House of Representatives of making more specific the qualification requirements, they lent further encouragement to the establishment of employee benefit plans, which are now approaching 30,000 in number.[19]

The Committee on Pension and Profit-Sharing Trusts of the Section of Taxation of the American Bar Association is taking an active part in offering suggestions to the Treasury Department about the regulations to be issued respecting the new provisions. Comments from other interested members of the Association will be welcomed by the Committee, of which Frederick A. Ballard, American Security Building, Washington, D. C., is the Chairman.

19. The Annual Report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1954, showed that unpublished rulings on the initial qualification of 26,464 plans had been issued by the end of that fiscal year. 1,337 applications for rulings were then on hand.

Citizens of Freedom:

Some Words for New Americans

by William C. Kandt · *Judge of the District Court, Division Number One, of Kansas (Wichita)*

■ The following article is taken from the principal address given last fall at naturalization proceedings in the United States District Court for the District of Kansas, in Wichita. Though it is addressed to new Americans, what Judge Kandt has to say is worthy of the attention of all citizens of the United States, naturalized or native, first-generation or descendants of the Pilgrim fathers.

■ Perhaps the most vital human factor of citizenship in any nation is that nation's concept of personal freedom. The value of that nation's existence will be measured ultimately not in terms alone of its material wealth, not in terms alone of its industrial aggressiveness, not in terms alone of the size of its corporate structures, not in terms alone of the extent of its governmental social projects, or of the language of its constitution, or of the wisdom of its laws; neither will it be judged alone by the mass education of its children, nor alone by its discoveries in science, nor by its victories in war, nor by its assertion of world leadership. The glory of its civilization and the strength of its ideals must be measured ultimately by the realistic application of its concept of personal freedom upon the individual; and not only upon its own citizens, but upon all men everywhere.

If human experience proves anything, it proves with a universal certainty man's yearning and insistence to be free. The American Revolution, with its blending of nationalities, demonstrated how this yearning can be brought to living reality, in the face of tyranny, when enough men with enough power assert their determination and their will to be free. Personal freedom is more than an idea of the intellect. It may be an emotion, a feeling, a desire, or an agonized expression of a trammeled will.

To Americans, the idea of personal freedom holds different values for different men. To our civilization in general, personal freedom means basically, the liberty of the individual to conduct himself as he may choose. Through the hard and bitter experience of our ancestors, this has come to include the liberty of the individual to think as he may please; to form and to express opinions, upon any subject, political or otherwise, as he may please; to worship as he may please; to associate and assemble with whomsoever he may please; to acquire property; to stand equally before the law, and to resist violations of the limitations of government. These freedoms, and many others, now expressed as the Rights of Man, are more specifically enumerated in the English Bill of Rights, the French Declaration of the Rights of Man, the American Declaration of Independence, the American Bill of Rights as contained in the first nine amendments to our Constitution, and, more recently, in the various declarations of the United Nations. Unique among governments are the safeguards supplied by the Constitution of the United States against governmental encroachment upon personal freedom.

The early first-generation Americans were not deceived, and Americans now are not beguiled by the false doctrine that personal freedom is a mere dream and must exist absolute and unlimited in order to be workable in human affairs. Such doctrine, designed for our frustration, scoffs at the ideal, seeks to ridicule the tested truth of man's experience, and is advanced by mean and power-hungry men who wish to justify the use of naked, unlimited force whereby to extinguish personal freedom. The early first-generation Americans recognized then, and we recognize now, the necessity of limitation upon personal freedom if peace and order and the pursuit of happiness for all are to prevail. This concept of personal freedom became workable with the understanding that the individual may conduct himself as he may please, subject only to restrictions equal for all and as few as possible for the public welfare and safety. From this understanding, rights and responsibilities became clear. The citizen has the right to act as he may please, with the delicate responsibility that, in doing so, he must not harm or tread upon the rights of others.

As established by our forefathers, this doctrine of personal freedom has inflamed the aspirations and adventures and has stirred the actions and achievements of succeeding generations of Americans to the extent that more and more men now have experienced the universal truth of man's right to be free. The individual, in all his dignity, is still the fundamental unit of our society. The pressure for freedom grows, and the exhilarating influence of freedom expands. Yet in the days of our time we are experiencing once again how easily personal freedom might be lost. Challenged by false doctrine, we feel again the need to define and to relearn our basic concept of freedom. During the crisis, our comprehension sometimes becomes blurred by frustration and confusion. Sometimes it seems that our passion for freedom has become dissipated by the terrible tensions of friction, suspicion and fear. And sometimes it seems that the price for maintenance is too exacting, and that we are neglecting our heritage. But these are surface impressions merely. We are simply examining and re-examining ourselves and our position with freedom, while the immigrant still seeks entrance to our land.

We are pleased to receive new citizens among us. You can challenge us with new truth and ideas. You can bring to us new talent and new spirit. You can fire our imaginations, enliven our adventures, attack our weaknesses, bolster our strengths, criticize and improve our institutions, and stimulate our ideals. You can remind us that we must live in equality in order to maintain equality; and that, in order to preserve freedom, we must understand freedom. This you can do, openly and freely, for you are now America's first-generation citizens of freedom—citizens of these United States.

Nominating Petitions

Utah

■ The undersigned hereby nominate D. A. Skeen, of Salt Lake City, for the office of State Delegate for and from the State of Utah, to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

George S. Ballif, Jackson B. Howard, Allen B. Sorensen, Clair M. Aldrich and J. Robert Bullock, of Provo;

John D. Rice, F. Gerald Irvine, A. U. Miner, Harry D. Pugsley, Rendell N. Mabey, John W. Ensign, Fisher Harris, A. D. Moffat, Leland S. McCullough, Frank E. Moss, E. Earle Greenwood, Jr., O. W. Moyle, Jr., D. Ray Owen, Jr., John H. Snow, Junius S. Romney, H. Van Dam, J. D. Skeen, F. Robert Bayle, E. C. Willey and Perris S. Jensen, of Salt Lake City.

Georgia

■ The undersigned hereby nominate William B. Spann, Jr., of Atlanta, for the office of State Delegate for and from the State of Georgia to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Robert B. Troutman, F. M. Bird, Alex W. Smith, Rembert Marshall, John L. Tye, Jr., E. Smythe Gambrell, W. Neal Baird, Henry B. Troutman, John H. Boman, Jr., Joseph B. Brennan, Herbert Johnson, Henry L. Bowden and C. Baxter Jones, Jr., of Atlanta;

Frank D. Foley, Howell Hollis and B. H. Chappell, of Columbus;

John B. Harris, C. Baxter Jones, Charles J. Bloch, T. Baldwin Martin and R. L. Anderson, Jr., of Macon;

Alex A. Lawrence, A. R. Lawton, Jr., B. B. Cubbedge and Kirk McAlpin, of Savannah.

Delaware

■ The undersigned hereby nominate William H. Bennethum, of Wilmington, for the office of State Delegate for and from the State of Delaware to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

James R. Morford, Thomas Cooch, P. Warren Green, F. J. Miller, Samuel Handloff, E. N. Carpenter, II, David A. Moore, W. B. DeRiemer, Hugh K. Clark, John R. Barksdale, Henry W. Bryan, Albert T. St. Clair, Carl A. Hechmer, John T. Gallagher, C. W. Taylor, Leighton S. Dorsey, C. Marshall Dann, T. Crawley Davis, Jr., Aubrey B. Lank, Howard Duane, Anthony F. Emory, Albert W. James, Bernard Hessler, Jr., George L. Sands and John M. Bader, of Wilmington.

Books for Lawyers

THE AMERICAN LEGAL SYSTEM: THE ADMINISTRATION OF JUSTICE IN THE UNITED STATES BY JUDICIAL, ADMINISTRATIVE, MILITARY AND ARBITRAL TRIBUNALS. *By Lewis Mayers. New York: Harper & Brothers. 1955. $6.50. Pages 589.*

The author, for many years a professor of law at The City College of New York and a practicing lawyer as well, is a serious student of the American scene. His book has been long in the making. The present volume has evolved from mimeographed editions of a work of the same name used by him in the classroom since 1935.

Too many books in this field sprawl off in every direction, leaving the reader, whether he be lawyer or novice, in hopeless confusion. The great merit of this book is its perception of the unifying position of the courts in the administration of justice, whether in judicial, administrative, military or arbitration proceedings. Consequently the presentation is orderly and easy to comprehend. The style, moreover, is attractive and remarkably free from outmoded legal technicalities. The aim is to explain in clear outline the administration of justice in America today in all its phases with as much of its historical background as is necessary for the reader to understand what is happening today.

Part I, dealing with the work of the courts, is naturally the longest. After considering the structure of the courts and their jurisdiction, the author outlines the scope of criminal proceedings under the headings of investigation, prosecution and summary proceedings. It is refreshing to see this recognition of the primary importance of the enforcement of the criminal law both from the standpoint of society and of the individual. Then follow two admirable chapters on the objectives and procedure of civil proceedings. Next come three chapters dealing with the relationship of the courts to the executive and legislative branches of the government and the work of the courts as molders of the law. This part concludes with a valuable chapter on the work of judges, jurors and lawyers.

Part II consists of five chapters dealing with administrative tribunals and their supervision by the courts under the headings of enforcement proceedings, proceedings against private parties other than enforcement proceedings, permissions and grants, the adjudication of private disputes and the presence of administrative tribunals. It is an admirable summary of a complicated field in less than a hundred pages.

Part III treats of military tribunals and their control by the courts, topics of ever-increasing importance in the tense period in which we live and which are not as well known to most lawyers as they should be.

Part IV discusses arbitration proceedings and the extent to which the courts control them. The book concludes with valuable bibliographies and an adequate index. It is attractively printed and bound.

This rapid summary of the contents of the book necessarily fails to reveal the wealth of its contents. It is a volume that will interest judges and practicing lawyers as well as laymen and beginners in the law. I know of no other volume that will serve them so well.

ARTHUR T. VANDERBILT
Supreme Court of New Jersey

THE SCOURGE OF THE SWASTIKA. *A Short History of Nazi Crimes. By Lord Russell of Liverpool. New York: Philosophical Library. 1955. $4.50. Pages 259.*

This is a short, accurate and vivid description of the Nazi War Crimes by Lord Russell of Liverpool, Deputy Judge Advocate General of the British Army of the Rhine, who was legal adviser to the Commander in Chief with respect to the trial of German war criminals in the British Zone of Occupation. The book takes on added interest when it is remembered that Lord Russell, a grandson of Sir Edward Russell, resigned his position as Assistant Judge Advocate General rather than withdraw it from publication when requested to do so by his superiors. The book is not pleasant reading, but it gives the facts about the Nazi war crimes which should be remembered in any intelligent approach to contemporary history.

Lord Russell does not deal with the legal or procedural aspects of the Nuremburg trials as does Whitney Harris in his *Tyranny on Trial.* He does, however, deal with the war crimes which were established beyond peradventure by the evidence produced at Nuremburg and which made those trials necessary if the ideals of our civilization were to be preserved. The book begins with a description of the instruments of tyranny created by Hitler,—the leadership corps of the Nazi Party, the S.S., the S.D. and the Gestapo. Then follows a description of the crimes committed by these instruments of tyranny—crimes committed, not in the heat of passion, but in what Sir Hartley Shawcross has described as "cold, calculated, deliberate attempt to destroy nations and races, to disintegrate the traditions, the institutions and the very existence of free and ancient States. Twelve million murders! . . . Murders conducted like some mass production industry. . . ."

The headings of the chapters correctly indicate the nature of the subject matter: ill-treatment and mur-

der of prisoners of war; war crimes on the high seas; ill-treatment and murder of the civilian population in occupied territory; slave labor; concentration camps; the "final solution" of the Jewish question, which was the attempt to kill all the Jews on the continent of Europe and which resulted in the killing of six million of them. All of these are described with historical accuracy, not on the basis of propaganda reports, but on the sworn testimony of witnesses heard in open court and on documents the authenticity of which cannot be questioned and which, in most instances, were made by the Nazi criminals themselves.

The record made before the International Military Tribunal at Nuremburg comprises forty-two printed volumes. The records of the other war crimes trials are also lengthy. To read all of this vast mass of material is something that even the scholar of the law has not the time to undertake. It is important, however, that what happened under the Nazi regime in Germany be understood throughout the world in order that precautions may be taken against such a thing happening again. The danger is not from the Germans, but from the totalitarian state which came to flower in the Nazi regime. These war crimes reveal the weakness and the danger of the totalitarian state wherever it may arise—the danger of entrusting power to men without the restraints imposed by constitutional limitations and enlightened public opinion free to express itself. Whitney Harris in this country and Lord Russel in England have rendered a distinct public service in giving us a brief history of these war crimes in a form that the average man can read and understand.

JOHN J. PARKER
United States Court of Appeals
Charlotte, North Carolina

GUIDE TO COMMUNITY ACTION, *A Sourcebook for Citizen Volunteers. By Mark S. Matthews. New York: Harper & Brothers. 1954. $4.00. Pages 447.*

This excellent reference book is dedicated to the many "who are creating a design for democracy through volunteer cooperative action in all the communities of our country". The author is a practicing lawyer, a former national president of the Junior Chamber of Commerce and currently chairman of the Executive Committee of the Greenwich, Connecticut, Chamber. He has had varied experience in public administration, having been Legislative Representative of the City of New York, and Assistant Head of the Federal, State and Local Relations Section of the Department of Justice. Many bills which he drafted were subsequently enacted into law by the Connecticut and New York State legislatures. Mr. Matthews is also a member of the Councils of the National Municipal League and the National Civil Service League.[1]

Principal purposes of the compilation are to suggest programs and to project ideas which may be adapted to meet needs in various communities and to help local groups working for community betterment to utilize the experience of other groups and to use the great wealth of advisory assistance available without charge or at a nominal cost from hundreds of sources (Preface, ix).

The introduction (pages xi-xiii) declares that the strength of our democracy is largely dependent upon the quality of leadership which emerges from free association of individuals with common ideals and purposes; and that leaders are often just ordinary persons who have grown to leadership stature through practice in cooperative effort. Appendices are as follows:

Appendix A (pages 375-384), "Special Days, Weeks and Months", such as dates of historic events, birthdays of some of those who have made important contributions to this country's way of life, religious and other traditional observations and special occasions created by proclamation or legislative action.

Appendix B (pages 385-395), a concise guide to the language and forms of parliamentary procedure including a glossary of common terms, procedure for presenting and considering motions, and a complete account of a fictitious town's citizens association meeting.

Appendix C (pages 396-407), giving sources of films and film information useful in carrying out the specific activities suggested.

Appendix D (pages 408-425), called "A Course in Effective Speech", includes suggested materials and other aid.[2]

There is a good-enough index (pages 426-434). The table of contents (vii-viii) shows the wide sweep of the work. Thus, under Part I, An Effective Community Organization, there are chapters on: Membership, Officers, Committees, Meetings, Financial Administration and Fund Raising, and Public Relations.

Under Part II, The Service Program: Organizing for Service, Community Arts, Sports and Recreation, Safety and Fire Prevention, Health, Welfare, Brotherhood, Religion, International Relations, Americanism, Education, Vocational Guidance and Rehabilitation, Labor-Management Cooperation, Conservation, Government, Community Development, and National Security.

At the end of each chapter are "sources of aid", listing organizations, a few words indicating their objectives, and source material relating to matters covered in the chapter, including information regarding sources of films and film information (for example, pages 42-45 and 68, at the end of Chapter 2).

It is perhaps unreasonable to suppose in a volume of moderate size covering so large a subject matter there would be no omissions and a complete description of all organizations listed and of their work. At all events, there are lacunae. Thus, one looks in vain for reference to the Cumulative List of Organizations, contributions to which are deductible under former 23 (o) or 23 (q) of the Internal Revenue Code,

1. As I likewise have an association with these leagues, what follows may be challenged for favor.

2. George P. Baker's "Principles of Argumentation" should not have been omitted.

etc., revised June 30, 1950, 1952 Supplement, issued by the Treasury Department, Bureau of Internal Revenue—a convenient giving of names and addresses of exempt organizations, without description of purpose, however, except to the extent the name may so indicate. The information contained in *American Foundations and Their Fields,* published by American Foundations Information Service, 860 Broadway, New York 3, New York, can, in a good many instances, be used helpfully to supply additional and fuller information regarding the nature of those foundations included in both publications.

Although the National Municipal League is named and, with its monthly magazine, the *National Municipal Review,* well described (pages 331-332), and reference is made to the League's many activities including encouragement of proportional representation, there is no mention of the Proportional Representation League which has been amalgamated with the National Municipal League and valuable work the P. R. League does in an effort to dispel misrepresentations and specious denigrating arguments of political machines and others; and in seeking to recount accurately reasons for adoptions and discontinuances of the system where these have occurred. Proportional representation voting under the Hare System with the single transferable vote has been for thirty years the keystone of Cincinnati's good government structure and merits attention and support as an interesting and valuable formula for local elections.[3]

So, too, are missing mention of the National Trust for Historic Preservation and its National Council for Historic Sites and Buildings, 712 Jackson Place, N.W., Washington 6, D.C., and Civil Service Assembly of the United States and Canada, 1313 East 60th Street, Chicago 37, Illinois, and its excellent quarterly journal, *Public Personnel Review.* These deserve inclusion in the later edition of Mr. Matthews' book, which it is hoped popular demand may require.

The American Planning and Civic Association is listed, page 349 bottom, with two or three lines of description, but not the affiliated "National Conference on State Parks", Washington, or the valuable quarterly magazine, *Planning and Civic Comment,* the official organ of these two organizations.

Under "Public Relations", Nieman Reports, published by the National Alumni Council of the Harvard Nieman School of Journalism Fellows, 44 Holyoke House, Cambridge 38, is far too valuable a publication by experts concerning the press not to have found a place in sources of aid. Under "Public Relations", as to "Dealing with the Press", (pages 75-78) there is no advice or suggested remedy when the press, for selfish or other unworthy reason, opposes political or other ameliorations in the community. Perhaps it would take a much longer chapter than is possible in a work like this to give advice and comfort to those seeking improvement and opposed by a powerful, completely hostile newspaper of wide circulation.

Conceivably, the compiler thought that legal aid is a subject outside the periphery of activities comprehended. If so, disagreement must be registered; since the National Legal Aid Association, 328 Main Street East, Rochester 4, New York, and its constituent legal aid organizations in various (too few) communities, perform one of the most vital activities a well-ordered country and its urban confines require. It has often been found that non-legal officers or board members of legal aid organizations are highly useful components and promoters of lay support.

While (page 353) U. S. Department of Commerce, Washington 25, D.C., is shown as having available model traffic ordinances, a manual on uniform traffic control devices and information about federal aid for urban highways, the National Committee on Uniform Traffic Laws and Ordinances and its model traffic ordinance, last revised and approved in 1952, as a public document should have been high-lighted, because prompt, just, certain and equal enforcement of traffic laws has an important bearing, not only on safety, but on respect for law and on good government.[4]

Some of the interesting and important modern developments which find a place in a well conducted law school course on municipal corporations or in courses in schools of public administration are, in the reputed language of Sam Goldwyn, "included out". Yet, these have their best chance of success if championed by citizen organizations which help create a climate favorable for them in the community. Modern developments: home rule for cities and counties, zoning, aesthetics, setbacks, excess condemnation, redevelopment, public housing, freeways and the merit system require unofficial support for adoption and, as well, to resist the adverse, often understandable, clamor of property owners and others injured, or thinking they are, by what needs be done for the general good.

A number of the activities of the groups referred to in the book are somewhat intimately related to the law; the National Probation and Parole Association, Inc., of New York City, and Osborne Association, Inc. (pages 184, 185), for example. In the chapter, "Community Development" (page 336) under the head "Community Beautification", the author says (page 342):

> Important to civic development of any town or city is its physical appearance. A beautiful community draws business from the area and from tourists, attracts new businesses and industries, develops a civic pride that results in greater citizen interest and participation in public affairs. . . .

This is a pragmatic statement in support of the growing legal opinion that as beauty can add money value to properties and localities, aesthetics should be a subject of legal pro-

3. Seasongood, *The Merits of Proportional Representation in City Elections,* 16 SOCIAL SCIENCE 237 (1941).

4. Seasongood, book review, *Model Traffic Ordinance,* 2 JOURNAL OF PUBLIC LAW 431 (Emory University Law School), No. 2 (Fall 1953).

tection.[5] Information such as that quoted above may lessen too much adherence to decisions limiting both zoning and restrictions on use of billboards for aesthetic reasons.[6]

There are many publications which though bearing somewhat on law, the usual busy practitioner feels he cannot take time to read. The question whether this treatise would be of interest to lawyers generally does not permit categorical reply. The answer will depend somewhat on what the possible legal reader conceives to be the lawyer's function. If he is like the English judge who took, on his wedding trip, a treatise on contingent remainders and who declared Romeo and Juliet a mere tissue of improbabilities, this bread-and-butter, black-letter type of lawyer will not find the book to be, for him, worthwhile. However, both as a matter of duty and as a practical proposition, a lawyer should have community, governmental, charitable and other not strictly legal interests and he will be a better lawyer if he devotes a substantial amount of his time to such "extra-curricular activities". The "very model of a modern major general", in the *Pirates of Penzance* had "information vegetable, animal and mineral" in divers fields. This sounds foolish as a basis for qualifying him. However, it is not. Among the outstanding of the British Bench and Bar, so many had secondary intellectual interests, served the government and performed other than legal services during busy lives, that it may not unfairly be said engaging in such outside endeavors by eminent judges and barristers is the rule there rather than the exception. Casual mention of a few names: Bacon, Brougham, Sir William Jones, Sir Frederick Pollock, Haldane, Reading, Macmillan, Simon, Sir Edward Clarke will illustrate the point. The office of Lord Chancellor is a political as well as a legal position reached almost invariably after service in Parliament and as Solicitor and Attorney General. So advancement in the legal profession and participation in politics are more intertwined there than with us where engaging in both may even have an adverse effect on the former.

A reader of a city directory said it was fairly interesting but had no plot to it. Mr. Matthews' book is a helpful guide. On a famous occasion, when a member, speaking in Parliament said, "I ask myself the question . . . etc.", Lord Loughborough interjected, "And a damned foolish answer he will get." At the risk of similar characterization by the impatient or unconvinced of my reply to the question, "Should lawyers read, or at least have a glance at this book", my answer is yes.

MURRAY SEASONGOOD

Cincinnati, Ohio

5. See the late opinion to this effect in *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, decided November 22, 1954, commented on in the article, *Esthetics and the Police Power, U.S. Supreme Court Holds District of Columbia Redevelopment Act Constitutionally Valid*, by Albert S. Bard, THE AMERICAN CITY, (February, 1955) page 179.

6. See, *e.g.*, *State ex rel. Jack, et al. v. Russell, Bldg. Commr.*, 162 O. St. 281 (1954), first paragraph syllabus; and 123 N.E. 2d 261:

"1. Zoning ordinances which are not purely fanciful or esthetic but which are reasonable and comprehensive in their application and have a relation to the public health, morals and safety. . . ."

do not violate the Constitution. The syllabus in Ohio is the law of the case and, in the above, repeats in substance previous decisions to the same effect. However, new thinking is urged to see whether the apparent contradiction between "esthetic" and having a relation to the public health, morals and safety should longer prevail.

Ellis, Appellant v. *Ohio Turnpike Commission*, 162 O. St. 86 (1954), is a ruling the Commission could not acquire by appropriation proceedings the right to prohibit the erection of billboards, etc. on the remaining lands of an owner at a distance within which they would be visible from the travelway of the turnpike; first, because of lack of authorization to the Commission, and second, because "visible" was too indefinite a term to be valid. As to the second of these propositions, compare *Perlmutter* v. *Greene, State Supt. of Public Works*, 259 N.Y. 327, 182 N.E. 532; *Kelbro, Inc.* v. *Myrick, Secretary of State*, 113 Vt. 64, 30 A. 2d 527, 529.

SUCCESSFUL HANDLING OF CASUALTY CLAIMS. *By Patrick Magarick. New York: Prentice-Hall, Inc. 1955. $6.50. Pages 495.*

A complete course in casualty claim handling is discussed in this volume, which includes most types of casualty claims. The well-qualified author brings you vital data about the law governing, claim technique in handling and human psychology arising in this broad field.

Being familiar with the problems of the field-man, supervisor and home office attorneys, the author draws on his twenty-five years' experience, during which time he has held positions of importance with Aetna Casualty and Surety Corporation, American Casualty Company, and the National Surety Corporation. Many reference books of interest to claim men are listed but there are no cases cited. The law is stated in general principles. Torts, negligence, bailments, frauds, automobile and public liability, employer-employee rules are focused upon as relating to various types of policies.

This work is especially valuable as a guide for investigation, settlement, negotiations, reporting and the evaluation and litigation of casualty claims. Several chapters are devoted to the "Handling of Workmen's Compensation Cases". The practical application of subrogation rights, salvage and contribution are outstanding discussions on these often-neglected and profitable aspects of casualty insurance.

Although not compiled to be a technical work, it will be completely understood by young attorneys and yet "meaty" enough to be of considerable value to the experienced lawyers. Certainly time-saving steps in investigation and a splendid analysis of the various types of casualty coverages with the exclusions are valuable additions to any library.

GIBSON B. WITHERSPOON

Meridian, Mississippi

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Courts . . .

Finality of Tax Court's decision in renegotiation case

■ *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351, 99 L. ed. (Advance p. 311), 75 S. Ct. 419, 23 U. S. Law Week 4116. (No. 263, decided March 7, 1955.) *Judgment of the Court of Appeals for the District of Columbia Circuit reversed.*

At issue here was the finality of a Tax Court decision under the Renegotiation Act of 1942.

During 1941, the Maritime Commission arranged for respondent to carry supplies for the British to the Red Sea area. A written contract was entered into between respondent and the British Ministry of Transport. The respondent was paid some $351,000 out of Lend-Lease funds by the Commission. Later, the Commission, acting under the Renegotiation Act, determined that respondent should repay $164,000 as "excessive profits".

Respondent took the case to the Tax Court under Section 403 (e) (1) of the Act, which authorizes the Tax Court "to finally determine the amount, if any, of excessive profits" and provides that "such determination shall not be reviewed or redetermined by any court or agency." The Tax Court disposed of the case by holding as a matter of law that the only contract was between respondent and the British Ministry and that the Commission had made no renegotiable contract. The Court of Appeals dismissed an appeal on the ground that the Tax Court's decision was not reviewable.

Mr. Justice BLACK reversed, speaking for the Supreme Court. The Court held that Section 1141 of 26 U.S.C., which vests courts of appeals with "exclusive jurisdiction to review decisions of the Tax Court", authorized review of renegotiation orders with the exception of determinations as to profits under Section 403 (e) (1). Exclusive jurisdiction had been given to the Tax Court in these cases, the Court said, because of its special familiarity with business and accounting practices. In this case, however, the Court said, the Tax Court had made no determination at all about profits. "It simply held, relying largely on common law principles of contract law, that there was no government contract to renegotiate. The existence or nonexistence of profits was wholly irrelevant. . . ." The Court declared that this was not the type of determination made final by Section 403 (e) (1).

Mr. Justice DOUGLAS dissented without opinion.

The case was argued by Oscar H. Davis for petitioners and by Harold B. Finn for respondent.

Insurance . . .

Marine insurance contracts held subject to state laws

■ *Wilburn Boat Co.* v. *Fireman's Fund Insurance Company*, 348 U. S. 310, 99 L. ed. (Advance p. 281), 75 S. Ct. 368, 23 U. S. Law Week 4101. (No. 7, decided February 28, 1955.) *Judgment of the Court of Appeals for the Fifth Circuit reversed.*

The Court upheld the power of the states to regulate the terms and conditions of marine insurance contracts in this case. The petitioner had argued that federal admiralty law must be applied to his marine insurance policy.

Petitioner owned a small houseboat on Lake Texoma, an artificial lake between Texas and Oklahoma, which was used for the commercial carriage of passengers. The respondent insured the boat against fire and other perils. When the boat was destroyed by fire, respondent refused to pay for the loss on the ground that there had been breaches of warranties contained in the policy—for example, a provision that the vessel must be used solely for private pleasure purposes. The insurance policy was made and delivered in Texas. Under Texas law, the breach of the warranties was no defense to the suit unless the breach contributed to the loss. The district court refused to give the state law any effect, holding that a marine policy is governed by federal admiralty law; the court went on to find an established admiralty rule that requires literal fulfillment of every policy warranty, so that any breach bars recovery. The court of appeals affirmed.

The Supreme Court reversed, speaking through Mr. Justice BLACK. The Court said that there was no question of conflict between state law and any federal statute, since Congress has not taken over regulation of marine insurance contracts. While the policy was a maritime contract, and therefore subject to federal admiralty power, the Court declared that this did not necessarily mean that every term in the contract was controlled by federally defined admiralty rules. The Federal Government has left to the states much regulatory power over all types of insurance contracts, the Court said, and it did not not find that the "literal performance" rule had been established as a part of the body of federal admiralty law. The Court refused to adopt such a rule—the complexity of

Reviews in this issue by Rowland Young.

the problem of regulation and the fact that Congress, insurance companies and persons insured have all acted on the assumption that the states could regulate marine insurance were factors in the Court's refusal to create an admiralty rule to govern marine insurance. "We, like Congress, leave the regulation of marine insurance where it has been—with the States", the Court concluded.

Mr. Justice FRANKFURTER, concurring in the result, declared that the Court's opinion went beyond the needs of the problem before it and seemed to set forth a rule of much wider application than necessary.

Mr. Justice REED, joined by Mr. Justice BURTON, wrote a dissenting opinion. The dissent was based on a view of the necessity for uniformity in maritime law.

The case was argued by Theodore G. Schirmeyer and Mark Martin for petitioners and by Edward B. Hayes for respondent.

International Law . . .

Sovereign immunity no bar to counterclaim

▪ *National City Bank of New York* v. *Republic of China*, 348 U.S. 356, 99 L. ed. (Advance p. 315), 75 S.Ct. 423, 23 U.S. Law Week 4111. (No. 30, decided March 7, 1955.) *Judgment of the Court of Appeals for the Second Circuit reversed.*

In this case, the Court rejected a plea of sovereign immunity raised by an agency of Nationalist China to bar a counterclaim against China interposed by petitioner.

In 1948, the Shanghai-Nanking Railway Administration, an official agency of the Chinese Government, established a $200,000 deposit account with the petitioner bank. When China later sought to withdraw the funds, petitioner refused to pay and respondent filed suit in a federal district court. Petitioner interposed two counterclaims, seeking affirmative judgment for $1,634,432 on defaulted Treasury notes of respondent owned by petitioner. The district court dismissed the counterclaims after the plea of sovereign immunity was raised; the court of appeals affirmed.

The Supreme Court reversed, speaking through Mr. Justice FRANKFURTER. While the status of the Republic of China in our courts is a matter for the Executive to determine, the Court noted, the doctrine of sovereign immunity even for the United States "has not been favored by the test of time". The Court pointed to many cases in which the immunity of the United States had been waived or cut down. The Chinese Government was not being haled before one of our courts as a defendant; China was invoking our law but resisting a claim against it that would fairly curtail its recovery, it was said.

The Court pointed out American and Chinese citizens could sue in the Court of Claims for default on a United States bond, and that apparently China is suable on contract claims in its own courts.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice REED, joined by Mr. Justice BURTON and Mr. Justice CLARK, wrote a dissenting opinion. The dissent took the position that sovereign immunity for foreign governments from suit in our courts was a matter of comity. Since affirmative legislative action was necessary to allow a limited set-off against the United States as sovereign, legislative or executive action would be required to deprive the Republic of China of its defense to the counterclaim here, it was said.

The case was argued by William Harvey Reeves for petitioner, and by Louis J. Gusmano for respondent.

Seamen . . .

Breach of warranty of seaworthiness.

▪ *Boudoin* v. *Lykes Brothers Steamship Co., Inc.*, 348 U.S. 336, 99 L. ed. (Advance p. 296), 75 S. Ct. 382, 23 U. S. Law Week 4097. (No. 406, decided February 28, 1955.) *Judgment of the Court of Appeals for the Fifth Circuit reversed.*

Remarking that a seaman with a proclivity for assaulting people may be more dangerous than a hull with a latent defect, the Supreme Court here allowed damages for breach of the warranty of seaworthiness to a seaman injured when one of his shipmates attacked him with a brandy bottle.

The attack occurred during a drinking party aboard ship. Plaintiff was in his bunk asleep when a deck maintenance man, one Gonzales, entered his room to remove a bottle of brandy from under the bed. When plaintiff awakened, Gonzales attacked him with the bottle. There was testimony that indicated that Gonzales was drunk, having consumed nearly a fifth of liquor. When plaintiff was taken to the sick-bay, severely wounded, Gonzales created a disturbance outside, threatening the mate and trying to enter the sick-bay. Later, Gonzales went absent without leave and was discharged by the captain.

Speaking through Mr. Justice DOUGLAS, the Court reinstated the district court's holding that there had been a breach of the warranty of seaworthiness. The lower court had found that Gonzales was a "person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults". The district court held that he was not "equal in disposition and seamanship to the ordinary men in the calling." The warranty of seaworthiness is a species of absolute liability for the ship's owner. The Court declared that, while the warranty did not make the shipowner liable for injuries resulting from every sailor's brawl, the presence aboard ship of a seaman with a "savage and vicious nature" made the ship a perilous place. The evidence was sufficient to justify the district court's holding that Gonzales's disposition endangered the other members of the crew, the Court declared.

Mr. Justice REED announced that he concurred in the result on the ground that the ship's officers were negligent.

The case was argued by Raymond H. Kierr for petitioners and by Andrew R. Martinez for respondent.

Reorganizations . . .
Jurisdiction of the SEC to pass on a fee to be paid in connection with a reorganization plan

■ *Securities and Exchange Commission* v. *Drexel and Company,* 348 U. S. 341, 99 L. ed. (Advance p. 300), 75 S. Ct. 386, 23 U. S. Law Week 4098. (No. 153, decided February 28, 1955.) *Judgment of the Court of Appeals for the Second Circuit reversed.*

The issue in this case was the jurisdiction of the Securities and Exchange Commission to pass on a fee to be paid in connection with a reorganization plan filed by one of its subsidiaries. The Court upheld the Commission's jurisdiction.

The reorganization plan was part of the general unraveling and reorganization of the Electric Bond and Share Company pursuant to the Public Utility Holding Company Act of 1945, 49 Stat. 803, 15 U.S.C. §79 *et seq.* The plan was filed under Section 11 (e) of the act by Electric Power and Light Corporation, a subsidiary of Bond and Share. It provided for the creation of a new holding company to which Electric Power and Light would transfer stock and other assets, retirement of preferred stocks of Electric Power and Light, distribution of shares of the new corporation to holders of Electric Power and Light's common stock, and payment of some $2,200,000 to Electric Power and Light by Bond and Share in settlement of intrasystem claims. Both Bond and Share and Electric Power and Light filed applications under Sections 10, 11 and 12 of the Act, seeking approval.

The Commission consolidated the proceedings and entered one order approving both. In approving the plan of Electric Power and Light, the Commission "specifically reserved (jurisdiction) to determine the reasonableness and appropriate allocation of all fees and expenses. . . ." Later the Commission held hearings and fixed a fee for Drexel and Company which neither Drexel nor Bond and Share thought adequate. The district court approved the Commission's fee and expense orders; the court of appeals reversed that part of the orders dealing with Drexel's fee "for lack of jurisdiction in the Commission."

Mr. Justice DOUGLAS, reversing for the Supreme Court, rejected the argument that reservation of fees under Section 11 could not supply the failure to reserve the matter of fees in the Section 10 and 12 proceedings. The fees were incurred with the Section 10 and 12 proceedings.

The Court said it would have to read the Act "with an extremely hostile eye" to deny the Commission jurisdiction. Sections 10 and 12 plainly give the Commission power to fix the fees payable by Bond and Share, one order was issued in all three proceedings, and the reservation of jurisdiction was over "transactions incident" to the plan as well as fees and expenses incurred in connection with the plan itself.

Mr. Justice FRANKFURTER, joined by Mr. Justice BURTON, wrote a dissenting opinion, taking the position that the Commission did not have comprehensive fee-fixing authority since Congress had explicitly limited the Commission's power to fix fees to the particular proceeding.

The case was argued by William H. Timbers for petitioner and by Arthur H. Dean for respondent.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE

Richard B. Allen • ASSISTANT

Administrative Law . . . *rule-making*

■ The Federal Communications Commission's rules regarding multiple ownership of broadcasting stations has been struck down by the Court of Appeals for the District of Columbia Circuit. The Court ruled that the Commission may not by its own rule arbitrarily limit the number of stations one licensee may own and under color of that rule deny without hearing the licensee's application for an additional station.

The controverted rule provided that the FCC would consider that there would be "a concentration of control contrary to the public interest, convenience and necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers or directors of more than five television broadcast stations". Similar rules limit AM stations to seven, and FM's to five.

The Court declared that the rule was not a mere announcement of policy, but a decision by the Commission "*in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license. . . ." The Court found the asserted power to be beyond the limits of the Commission's authority under the Communications Act.

Its decision, the Court pointed out, would not have the effect of permitting licenses without limitation, but would merely guarantee the license applicant a hearing. The Court thought that each case should be considered on its own merits; in some cases even five stations might be an undue concentration, while under "other circumstances common ownership of a greater number might be compatible with the public interest".

(*Storer Broadcasting Company* v. *U.S.*, C.A.D.C., February 15, 1955, Miller, J.)

Civil Procedure . . . *discovery*

Two recent state court decisions have placed limits on the use of discovery powers. The Supreme Court of Minnesota has ruled that a personal-injury plaintiff cannot use discovery to uncover the amount of the defendant's liability insurance coverage, and the Appellate Court of Illinois, First District, has refused to allow one party to ferret out the names of witnesses known to the other.

In the Minnesota case the plaintiff urged that the amount of insurance coverage was needed in order to make an evaluation as to whether the case should be settled. But the Court found no distinction between knowledge concerning the extent of insurance coverage and knowledge concerning the defendant's financial ability to pay. And the plaintiff, the Court indicated, would certainly not be entitled to the latter.

Minnesota's discovery rule is identical with the federal discovery rule. But in looking at federal cases, the Court found some divergence of opinion. The Court concluded, however, that the correct rule is that, although discovery is not limited to facts which may be admissible in evidence, it must be used for ascertainment of something either admissible or "such facts or information as will lead to the discovery of evidentiary information in some way related to the proof or defense of issues involved in the trial." Knowledge of the extent of insurance coverage would have no bearing on the action and would not come within the rule, the Court stated.

(*Jeppesen* v. *Swanson*, Sup. Ct. Minn., February 11, 1955, Knutson, J., 68 N.W. 2d 649.)

■ In the Illinois case, another personal injury suit, the plaintiff relied on a statute providing that discovery may be had by motion and interrogatories filed in the same action in all cases where the old chancery bill for discovery, or interrogatories in a bill for relief, were formerly appropriate. This statute, the Court held, did not alter or enlarge the permissible field of discovery, but only effected a procedural change.

In view of this interpretation, the Court declared, the identity of witnesses known to the defendant could not be obtained through the plaintiff's interrogatories, because these facts were not ascertainable under the old bill for discovery. And, the Court noted, the statute did not mention discovery of the opponent's witnesses as a permissible use of the device.

The plaintiff also relied on a rule of the Circuit Court of Cook County. This rule was intended to amplify the statute and the rules adopted by the state Supreme Court under it. But the Court dismissed this contention with the statement that circuit court rules could not "go beyond the statute or beyond the powers validly given by the rules of the Supreme Court."

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

(*Krupp* v. *Chicago Transit Authority*, App.Ct.Ill., 1st Dist., January 31, 1955, Friend,J., 124 N.E. 2d 13.)

Constitutional Law . . . *segregation*

■ The Court of Appeals for the Fourth Circuit has held that the doctrine of desegregation announced by the Supreme Court in the *School Segregation* cases, 347 U.S. 483, extends beyond the field of public education and requires unsegregated public recreational facilities.

In clear language the Court thus has reversed the decision of the United States District Court for the District of Maryland [40 A.B.A.J. 872; October, 1954], and the trend of other Southern decisions since the *School Segregation* cases, that the Supreme Court's decision was peculiarly applicable only to public education and not to public transportation and recreational facilities.

In reaching its conclusion, the Court relied not only on the school cases, but also on *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, and *Henderson* v. *U.S.*, 339 U.S. 816, in which the Supreme Court banned racial segregation in state institutions of higher learning and interstate railway dining cars, respectively.

The combined effect of all these decisions, the Court declared, is to destroy the basis of the doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537, that segregation is not unconstitutional when "separate but equal" facilities are furnished the Negro race. In older decisions on public recreational facilities, courts had found their bases for segregation in the state's police power to make rules for the preservation of order, on the theory that segregation would avoid racial conflicts.

"It is now obvious, however," the Court stated, "that segregation cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished to the other."

Said the Court:

> The Supreme Court expressed the opinion that [it] could not turn back the clock to 1896 when *Plessy* v. *Ferguson* was written. . . . With this in mind, it is obvious that racial segregation in recreational facilities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional.

(*Lonesome et al.* v. *Maxwell et al.* [consolidated with *Dawson et al.* v. *Mayor and City Council of Baltimore City*], C.A. 4th, March 14, 1955, *per curiam*.)

■ Dealing directly with the question of racial segregation in public schools, the Supreme Court of Delaware has decided that Negro public-school pupils in general have no more immediate right to be integrated into previously all-white schools than do the litigants who were before the Supreme Court in the *School Segregation* cases and whose ultimate relief is unknown since the Supreme Court has not entered decrees.

Milford, Delaware, school officials had admitted Negroes at the beginning of the 1954-55 term, but later reversed their action. A lower court had issued a mandatory injunction directing reinstatement of the Negro pupils. [For action below, see 41 A.B.A.J. 73; January, 1955.]

Implicit in the Court's ruling is the feeling that the Supreme Court may not require immediate desegregation in any decree ultimately entered in the *School Segregation* cases. Conceding that the right to unsegregated education has been established, the Court emphasized that a decree has been deferred for further argument and consideration of whether the plaintiffs in those cases are entitled to immediate relief.

"When its decision is made, it may or may not accord immediate relief," the Court stated. "By implication, it has indicated that the states affected may withhold immediate relief from others similarly situated."

(*Steiner* v. *Simmons*, Sup.Ct.Dela., February 8, 1955, Southerland, C.J.)

■ Prior to the Fourth Circuit's clear pronouncement, exegeses of the *School Segregation* cases continued. Remarking that "one's education and personality are not developed on a city bus," the United States District Court for the Eastern District of South Carolina held that the Supreme Court's decision had no application to the field of public transportation, where, the Court said, the doctrine of separate but equal facilities still prevailed.

In so ruling, the Court reached the same conclusion as the Maryland federal district court in *Lonesome* and a Georgia federal district court in *Holmes* v. *City of Atlanta*, 124 F. Supp. 290 (41 A.B.A.J. 165; February, 1955).

The Court refused to hold unconstitutional a South Carolina statute requiring separate facilities for Negroes on public busses. The Court read the Supreme Court's decision as being limited to the field of education. It noted, moreover, that the rationale of the case was that adverse sociological and psychological factors arise from segregation in education. "Certainly," the Court remarked, "no such effect can be legitimately claimed in the field of bus transportation." To hold the Supreme Court's decision applicable to public transportation, the Court concluded, "would be an unwarranted enlargement of the doctrine announced in that decision and an unreasonable restriction on the police power of the state".

(*Flemming* v. *South Carolina Electric & Gas Company*, U.S. D.C. E.D. S.C., February 16, 1955, Timmerman, J., 111 A. 2d 574.)

Constitutional Law . . . *self-incrimination and immunity*

■ The new immunity statute [18 U.S.C.A. §3486], enacted by the second session of the 83d Congress last year, has passed its first test in the

United States District Court for the Southern District of New York.

The statute provides that in congressional investigations and judicial proceedings involving national defense or security a witness who has claimed his constitutional privilege against self-incrimination may be compelled to testify and produce documentary evidence in return for immunity from future prosecution "in any court" as to any matter concerning which his testimony is compelled. The application for immunity is made by a United States attorney, upon approval of the Attorney General, "to the court that the witness shall be instructed to testify or produce evidence . . . and upon order of the court such witness shall be excused from testifying. . . ."

The instant case arose from a grand-jury investigation of espionage and conspiracy to commit espionage. The witness claimed Fifth-Amendment privileges, and the United States Attorney applied for an order directing the witness to answer.

The Court noted that immunity statutes have a long history and it refused to re-examine or overturn the line of cases which have held that Congress has power to enact immunity statutes—a "principle firmly imbedded in our constitutional law".

The witness' primary contention was that the immunity granted by the statute was not coextensive with and was not a full and complete substitute for the privilege taken. He claimed that the statute failed on this ground because it left him subject to state prosecution for state crimes. But the Court, rejecting this argument, ruled that "Congress has the constitutional power, certainly with respect to matters touching upon the national defense or security, to provide for a grant of immunity in exchange for compelled testimony which is broad enough to prohibit state prosecutions." The Court treated the field of national defense and security legislation as one preempted by the Federal Government and declared that the language of the statute would preclude both state use of the testimony in a state prosecution and state prosecution itself with regard to matters disclosed by the compelled testimony.

The Court also turned down a contention that the statute was unconstitutional because it devolved a non-judicial duty—granting immunity—on the judiciary. To do this, the Court interpreted the statute (when applied to judicial proceedings) as vesting no discretion in a court as to whether an order should issue, so long as it finds the judicial proceeding relates to matters of national defense or security, the United States attorney certifies the testimony is necessary in the public interest, the Attorney General approves, and no other legal objection exists to compulsion of the testimony.

(*In re Ullman*, U.S.D.C.S.D.N.Y., January 31, 1955, Weinfeld, J.)

Criminal Law . . . *insane accused*

■ May the United States constitutionally hold indefinitely for trial an accused person who appears to be permanently insane? The Courts of Appeals for the Ninth and Tenth Circuits have said no, but the Court of Appeals for the Eighth Circuit has held that it may.

The Judicial Conference of the United States began considering this problem in 1942. By 1945 the Conference had worked out proposed legislation, which in final form was enacted by Congress in 1948 as 18 U.S.C.A. §§4244-4248. The statute provides that after a determination that a person charged with a federal crime and in the custody of the United States is insane or mentally incompetent to stand trial, he shall be committed to the care of the Attorney General "until the insanity or mental competence of the person shall be restored. . . ."

This was challenged as a violation of due process because it would allow continued incarceration without trial, and of the Tenth Amendment because the duty and responsibility in connection with insane persons rests with the states. It was conceded that the contentions would probably not have great force if the accused's insanity were temporary and he would be able to stand trial without unreasonable delay.

But an *en banc* Court, with one judge dissenting, ruled that the validity of the legislation did not depend on the probable duration of an accused's mental incompetency and that it was constitutionally unobjectionable. The Court regarded the powers granted by the statute as necessary incidents to the Federal Government's power to provide for the enforcement of its own criminal laws. "We regard the means adopted by Congress," the Court concluded, "as having a real and substantial relation to the enforcement of the federal criminal laws, and as not unreasonable, arbitrary or capricious."

(*Greenwood* v. *U.S.*, C.A. 8th, February 14, 1955, Sanborn, J.)

Fair Trade . . . *non-signers*

■ The non-signer provisions of two more state fair trade acts have bitten the dust. Nebraska and Arkansas have lined up with Florida, Georgia and Michigan in holding non-signer sections unconstitutional. [For other decisions and references, see 41 A.B.A.J. 358; April, 1955.]

In the Nebraska case, the Supreme Court of Nebraska ruled that the state's entire fair trade act was invalid because it was broader than its title, but the *bête noire* of the piece was the non-signer section. The Court observed that while horizontal price-fixing among retailers is illegal, the effect of the non-signer provisions was to permit "one producer and one retailer to do on behalf of a class of retailers that which legally the members of the class are forbidden to do on their own behalf." The Court declared: "Liberty within the constitutional meaning includes absence of arbitrary and unreasonable restraint upon a person in the conduct of his business and the handling of his property".

Thus, the Court concluded, the non-signer section ran afoul of the constitutional prohibition against grants of special privilege and im-

munity and the guarantee of due process.

The Court rejected an argument that the power granted by the non-signer section was in the public interest and as such constitutional. It averred that the legislature could not fix prices "in the absence of appearance of public interest" and that the legislature could not confer a right on others that it did not have itself. The Court could discern no "recognizable public interest to be served" by the non-signer provisions.

(*McGraw Electric Company* v. *Lewis & Smith Drug Company, Inc.*, Sup. Ct. Nebr., February 11, 1955, Yeager, J., 68 N.W. 2d 608.)

■ The Supreme Court of Arkansas, in ruling the non-signer provisions of that state's fair trade act unconstitutional on due-process grounds, also emphasized the fact that one manufacturer and one retailer could fix prices throughout the state "without regard to the cost of manufacture or distribution". The Court thought the process of getting one producer and one retailer together would be quite simple. "It is frightening to think a device so easily concocted could destroy the constitutional bulwark protecting our personal liberties and the public welfare," it declared.

As in the Nebraska case, the Arkansas Court was faced with the public-interest argument in favor of the non-signer clause. But the Court said it could think of no way in which the public welfare was being jeopardized prior to enactment of the fair trade law or after. "To the contrary," it said, "we believe it is generally recognized that the interest of the public is best served by the opportunity to buy commodities in a freely competitive market."

The Court also rejected a contention that the statute's purpose was protection of trade marks rather than price-fixing. Trade marks had ample protection before the act, the Court declared, and the act gives them additional protection, even without the non-signer provisions. The Court said a manufacturer had no right to expect additional protection at the expense of the general welfare.

(*Union Carbide & Carbon Company* v. *White River Distributors, Inc.*, Sup. Ct. Ark., February 7, 1955, Ward, J., 275 S. W. 2d 455.)

■ A fair-trade manufacturer operating with contracts under the Maryland fair trade act has failed to get any help from the United States District Court for the District of Maryland to halt a non-signing discount house from operating by mail order in Maryland from a base in the District of Columbia, which, in company with Missouri, Texas and Vermont, is one of the four American jurisdictions without fair-trade laws.

The Court held that the McGuire Act [15 U.S.C.A. §45] "does not of itself relate to the subject matter of the sale of goods from a non fair-trade jurisdiction, either with or without sales consummated by mail order advertising, from one jurisdiction to the other." The Act, according to the Court, could apply only to re-sales within the fair-trade state and not to mail-order sales directly to the consumer.

Making a case survey of the fair-trade picture and looking at the legislative history of the McGuire Act, the Court declared that the effect of the Miller-Tydings Act [15 U.S.C.A. §1] and the McGuire Act was to remove re-sale price maintenance agreements from operation of the Sherman Act when the agreements were authorized by the law of a particular state. "In other words," the Court said, "Congress restored to the several states their power to regulate commerce within the state exempt from the Sherman Act, and Congress also exempted from the Sherman Act interstate commerce with respect to transactions either permitted or prohibited by the laws of the fair trade states respectively."

The Court, however, refused to dismiss the manufacturer's complaint, pending further action in the case.

(*Revere Camera Company* v. *Masters Mail Order Company of Washington, D.C., Inc.*, U.S.D.C.D. Md., February 23, 1955, Chesnut, J.)

■ In an announcement issued February 21, 1955 [23 U.S. Law Week 2433] the Federal Trade Commission indicated that it would give no help to fair-trading retailers in enforcing fair-trade programs. The Commission declared that it had no jurisdiction to investigate complaints that watch, silverware and appliance manufacturers had given the retailers no relief against price-cutters and had discriminatorily favored the discount houses.

The Commission reaffirmed its position that it has no jurisdiction "to exercise control over resale price agreements nor to enforce such agreements," and said that the McGuire Act confers none.

The Commission noted that the complaining retailers had at least two "avenues of self-help." They might seek injunctions under state fair-trade laws, or they might disregard their own resale contracts and compete pricewise with the discount houses. The latter course, the Commission noted, could be pursued with immunity since "state court decisions make it clear that a manufacturer who discriminates in the enforcement of his resale prices among competing customers cannot enjoin a price-cutting retailer".

Innkeepers . . . *liability*

■ A New York court has held that the Hotel Waldorf Astoria cannot avail itself of the state's statutory liability limitation of $100 per piece of luggage checked with it, where the hotel sold the luggage but failed to bring itself within another statutory provision authorizing sale of baggage left for more than six months.

The plaintiff checked fifteen pieces of baggage with the hotel in June of 1940. She was called to Europe by her mother's illness and because of the war did not return until 1947. The hotel, acting in good faith, had sold the baggage as unclaimed in January of 1946. There was evidence that an agent of the plaintiff had

visited the hotel in November of 1945, had offered to take the luggage but was advised that the hotel would keep it safe for the plaintiff. In an action for conversion, the jury found for the plaintiff and awarded her $17,573.56 damages.

The trial court had found that the hotel did not bring itself within the statute permitting sale of the luggage as unclaimed if left for more than six months, and this finding was affirmed by the Appellate Division, First Department. Even so, the hotel urged, its liability was limited to $1,500 under the limited liability section for "loss or damage to" a guest's property.

But the Court ruled that there was no "loss" or "damage" in the instant case and that the liability limitation had no applicability to a conversion by the hotel, even though the conversion was without *animus furandi*. One judge dissented on the ground that the limitation should apply in all cases, except theft or wilful misuse.

(*Dajkovich* v. *Hotel Waldorf Astoria Corporation,* N.Y.S.C., App. Div., 1st Dept., February 15, 1955, *per curiam,* 137 N.Y.S. 764.)

Labor Law . . .
non-Communist affidavits

■ The Court of Appeals for the District of Columbia Circuit has closed the door which some thought it had left open to enable the National Labor Relations Board to enforce the non-Communist affidavit provisions of the Taft-Hartley Act [29 U.S.C.A. §159 (h)].

In *Farmer* v. *United Electrical Workers,* 211 F.2d 36 (40 A.B.A.J. 151; February, 1954), the Court held the NLRB had no authority to enforce the non-Communist affidavit provision by depriving a union, whose officials the Board alleged had filed false affidavits, of its compliance status under the Act. But in that case the Court added: "We need not decide whether the union would be barred from the Act's benefit if its membership was aware of the alleged falsity of the affidavit."

Thinking it saw light, the Board sought to deprive a union of its compliance status on the ground that the union members must have known their president's 1954 affidavit was false because he had executed it within a month after conviction for falsity of his 1950 affidavit.

But the Court replied that "union awareness" didn't make any difference. The Board's lack of authority to police non-Communist affidavits "cannot be supplied by membership awareness of the falsity of the affidavit," the Court declared. The Court said that the threat of criminal action was assumed to be a sufficient deterrent to false swearing by union officials, and that if it wasn't, Congress, not the NLRB, should supply a new one.

(*Farmer et al.* v. *International Fur and Leather Workers Union,* C.A.D. C., February 15, 1955, Bazelon, J.)

Taxation . . .
medical deductions

■ The Court of Appeals for the Third Circuit has permitted a coronary thrombosis victim to deduct as a medical expense the cost of installing a stair-seat elevator in her home. In doing so, the Court reversed a ruling of the Tax Court that the cost of the installation, even though related to the taxpayer's health, could not be deducted as a medical expense because it was by its nature a capital item.

The taxpayer had installed the inclinator in 1948 on advice of her doctor. She claimed a deduction for its cost as a medical expense under §23 (x) of the 1939 code [§213 of the 1954 code].

The Court remarked that the "Commissioner's argument that the inclinator was not 'proximately related' to the imminent recurrence of petitioner's thrombosis has no merit whatsoever". It also found little merit in the Tax Court's denial of the deduction on the ground the expense was a capital expenditure not deductible. The Court noted that the Government's own regulations and instruction booklets allow medical deductions for such things as false teeth, artificial limbs, eyeglasses, crutches, hearing aids and even seeing-eye dogs. "All of these items", the Court observed, "can have a useful life and period of benefit to the particular taxpayer extending far beyond the year of deduction."

(*Hollander* v. *Commissioner,* C.A. 3d, February 14, 1955, McLaughlin, J.)

Wills . . .
restraint on marriage

■ A provision of a will revoking gifts to any of the testator's children who "shall marry a person not born in the Hebrew faith" is not too vague and is not an invalid restraint on either marriage or freedom of religion, according to a recent decision of the Supreme Judicial Court of Massachusetts. So holding, the Court has approved the revocation of any interest of a son in income and principal of a testamentary trust after the date of the son's marriage to a Roman Catholic.

The beneficiary attempted to show that he had not violated the provision because his wife had taken religious instruction in Judaism and had in fact become a convert. The Court noted that there was a concept (not accepted by all Jews) that one converted to the Jewish faith becomes as though born a Jew. But since the actual conversion of the wife did not occur until after the civil marriage ceremony, the Court found she was not "a person born in the Hebrew faith" at the time of the marriage.

The Court rejected the English view that the words "Jewish faith" and "Hebrew faith" are void for uncertainty, and adhered to the quite general American rule upholding testators' impositions of conditions requiring or prohibiting education in or marriage within a certain faith. Whether a person is "born in the Hebrew faith" can be definitely determined, the Court said, particularly since prima facie a person takes the religion of his parents.

The Court also rejected contentions that the provision, as construed by the Court, violated the constitutional guarantee of religious freedom and was an unreasonable restraint

on marriage. The Court declared that an inducement by way of gift to adopt or adhere to a particular religious belief is not a denial of religious freedom, for the beneficiary can always reject the gift. Noting that the restraint involved in the present case was only partial, the Court further found that partial restraints are valid unless unreasonable, and that the present restraint was not unreasonable.

In a companion case the beneficiary-son who had married outside the Jewish faith was removed as trustee under his father's will. The Court did not base the removal on a theory that the trusteeship was a "gift" under the will, or that the son's fight to preserve his position as a beneficiary was a violation of a provision of the will against contesting its validity. Rather, the Court ruled that in view of the dissension among the son and the other beneficiaries over the marriage provision litigation, the son was "now unsuitable for the discharge of those trusts" and that the "testator would not have wanted him to continue as trustee under these circumstances. . . ."

(*Gordon* v. *Gordon* [two cases], Sup.Jd.Ct.Mass., February 7, 1955, Wilkins, J., 124 N.E.2d 228 and 236.)

What's Happened Since . . .

■ On February 7, 1955, the Supreme Court of the United States:

DISMISSED for want of a properly presented federal question *Daniman* v. *Board of Education,* 119 N.E. 2d 377 (digested in 40 A.B.A.J. 708; August, 1954), leaving in effect a decision of the Court of Appeals of New York that the provisions of the New York City Charter requiring dismissal of any "employee" of the city who refuses, on grounds of self-incrimination, to answer any question propounded by "any legislative committee" regarding "official conduct" of the employee, applies to public school teachers who refused to tell a congressional subcommittee whether they were or ever had been members of the Communist Party.

■ On November 4, 1954, the Court of Appeals for the Seventh Circuit [216 F. 2d 574] reversed the ruling of the Tax Court in *Lynch* v. *Commissioner,* 20 T.C. 1052 (digested in 39 A.B.A.J. 1098; December, 1953). The Tax Court had ruled that a family partnership which had once been held valid for tax purposes by the old Board of Tax Appeals might be subsequently found invalid, even though the same facts existed at the time of subsequent adjudication. But the Court of Appeals declared that since there had been no change in either the substantive law or the factual situation regarding the good-faith formation of the partnership, the prior decision was binding as to the partners' income in subsequent years, under the doctrine of collateral estoppel.

■ On February 28, 1955, the Supreme Court of the United States:

DENIED CERTIORARI in *U.S. ex rel. Keefe* v. *Dulles,* 218 F. 2d — digested in 40 A.B.A.J. 993; November, 1954), leaving in effect the decision of the Court of Appeals for the District of Columbia Circuit that courts are without power to enjoin the executive department to commence diplomatic negotiations for the release of an American serviceman convicted in a French court and confined in a French prison, and that habeas corpus would not lie for the soldier's release because French officials responsible for confinement were not parties and could not be made subject to the court's jurisdiction.

DISMISSED for want of a substantial federal question *In re Anastaplo,* 121 N.E.2d 826 (digested in 40 A.B.A.J. 1086; December, 1954), leaving in force the decision of the Supreme Court of Illinois that an otherwise qualified applicant may be denied admission to the Bar because of his refusal to answer the question whether he was a member of the Communist Party or any other subversive organization on the list of the United States Attorney General.

Make Your Hotel Reservation Now!

■ The Seventy-Eighth Annual Meeting of the American Bar Association will be held in Philadelphia from August 22 to August 26, 1955. Further information with respect to the schedule of meetings appears in the February issue of the JOURNAL beginning at page 152.

Attention is called to the fact that many interesting and worthwhile events of the meeting will be arranged, as usual, to take place on Saturday and Sunday, August 19 and 20, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 22.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago, 37, Illinois, and should be accompanied by a payment of $10.00 registration for *each lawyer* for whom reservation is requested. *Be sure to indicate three choices of hotels* and give us your definite date of arrival as well as probable departure date. *All space at the Bellevue-Stratford, Barclay and Warwick Hotels is now exhausted.*

More detailed announcement with respect to the making of hotel arrangements may be found in the January issue of the JOURNAL at page 11.

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

▪ In March the Conference conducted its annual membership drive, during which the Association received more than 1000 applications. "Membership Month for March" was officially launched on February 24 by a letter from President Loyd Wright and National Chairman Stanley B. Balbach to the more than 10,000 members of the Conference. In their letter President Wright and Chairman Balbach said ". . . An application blank is enclosed. This represents one new member, *your* personal quota. A list of non-members can easily be compiled by checking in Martindale for lawyers whose names *are not* preceded by the triangular symbol, indicating membership in the American Bar Association.

"There are so many things that you can talk to these non-members about . . . the wonderful new American Bar Center, with its research facilities . . . the Legislative Service in Washington . . . the sixteen "bread and butter" Sections of the Association (which keep a busy lawyer abreast of developments in his field) . . . the Junior Bar Conference, with its opportunities for broadening professional contacts, for American Bar Association members under 36 . . . and so on."

A brochure entitled "Are You Hard To Convince?—Give Us *Three Minutes* and We'll Give You *Ten Reasons* Why" and the "Fact Brochure about the Junior Bar Conference of the American Bar Association", were also enclosed with a self-addressed envelope. In addition to this mass mailing, over 600 members of the Conference's official family were asked by Membership Chairman Thomas E. Taulbee to obtain five new members by the end of March.

In order to acquaint non-member young lawyers with the work of the Conference, our publication *The Young Lawyer* will be sent to all young attorneys in the areas of regional meetings just prior to each of the meetings in 1955. Arrangements have also been made to send a copy of that publication to all non-members of junior bar age in California.

During 1955 the Conference plans to continue its emphasis on other aspects of developing new members. State representatives of the Membership Committee will communicate with each newly-admitted member to explain the advantages of membership in the Association. All state organizations will be urged to arrange for appropriate admission ceremonies for lawyers newly admitted to the state and federal Bars. The Membership Committee has designed a set of attractive posters explaining the advantages of membership in the Association. These will be displayed by Conference personnel at the annual meeting of each state bar association during 1955 at a booth or table manned by Junior Bar Conference representatives. Furthermore, state representatives of the Membership Committee are being asked to appear before American Law Student Association groups to speak about membership in the Association.

In addition to these plans, Chairman Taulbee has suggested a series of special mailings to non-members in the judiciary, on the staffs of district attorneys and state attorneys general and the law school faculties. Finally, the committee plans to encourage each state representative to send a letter to the senior Association member in each law firm in his state asking that member to discuss with his partners and associates the advantages of membership in the American Bar Association.

The Conference's membership efforts toward its quota of 2550 new members in 1955 under Chairman Taulbee are planned in close cooperation with the Standing Committee of the Association under Chairman Archibald Mull, of Sacramento, California. The National Vice Chairmen of the Conference's committee are James L. Oakes, Brattleboro, Vermont; C. Robert Simpson, Jr., Los Angeles, California; Sam H. Mann, St. Petersburg, Florida; and James Baylor, Chicago, Illinois.

Mid-Winter Meeting of Council

Over fifty persons, including officers, council representatives, national committee chairmen and vice-chairmen, past national chairmen and representatives of the American Bar Association attended the two-day meeting February 19 and 20 in Chicago at the Edgewater Beach Hotel. Robert T. Barton, Jr., of Richmond, Virginia, member of the Board of Governors from the Fourth Circuit, and adviser from that body to the Conference, addressed the Council on Saturday and summarized the goals of the Association for 1955. Council representatives and national committeemen reported on their activities. Special committees were appointed to consider revision of the rules for applications for Awards of Merit and to study possible revision of the Conference organization with particular emphasis on the functions of council representatives and directors. The Council also heard from William Clarke Mason of Philadelphia, Pennsylvania, Chairman of the Special Committee on Group Life Insurance of the American Bar Association, who explained the plan and urged the Conference to support it. The Council voted to support the plan and instructed its delegate to the House of Delegates and its chairman to take appropriate steps to implement its support of the plan. Ray Garrett, of Chicago, Illinois, chairman of the Section of Corporation, Banking and Business Law, addressed the Council on that Section's

Junior Bar Conference Official Family Meets at the Midyear Meeting. First row (left to right) C. Baxter Jones, Jr., Delegate to the House of Delegates; Stanley B. Balbach, Chairman of the Conference; Thomas G. Meeker, Conference Secretary; Alvin B. Rubin, Council Member. Second row (left to right): Charlotte P. Murphy, Editor of the Young Lawyer; Frank L. Hinckley, Jr., C. Severin Buschmann, Rosemary Scott, Bert H. Early, C. Frank Reifsnyder, Council Members. Third row (left to right): Thomas E. Taulbee, Membership Chairman; Robert G. Nichols, Ray R. Christensen, S. Michael Schatz, R. Hasting Griffin, Jr., Robert L. Meyer, Council Members; Frederick G. Fisher, Procedural Reform Chairman. Last rows: Carol Taylor, Conference Headquarters Secretary; Kirk McAlpin, Minor Courts Chairman; Charles B. Levering, Professional Director; Paul R. Madden, Military Service Chairman; G. Arthur Minnich, Jr., Council Member; Robert R. Richardson, Activities Chairman, Payne R. Rattner, Legal Institutes Chairman; Jack C. Deacon, Public Information Chairman; Richard C. Dibblee, Unauthorized Practice Chairman; (above) William C. Farrer, Information Director; Bryce Rea Jr.; William R. Moller, Public Information Chairman; Morgan P. Ames, Services Director; C. Paul Jones, Hennepin County Junior Bar Chairman; William J. Fuchs, Annual Meeting Chairman; (above) Leo Dorfman, Minnesota Junior Bar Conference Chairman. Not pictured: Robert G. Storey, Jr., Conference Vice Chairman, and Charles F. Malone, Personnel Director.

study of cumulative voting and the cooperation being given to them by the Conference personnel. The Council also approved the application for affiliation of the Junior Bar Section of the Allegheny County [Pennsylvania] Bar Association.

Iowa Publishes Legal Education Survey

Bryce M. Fisher of Cedar Rapids, Iowa, president of the Junior Bar Section, Iowa State Bar Association, reports that his section has just published the "Iowa Junior Bar Survey in Aid of Legal Education". In 1953 a questionnaire of fourteen pages, covering a number of areas of legal practice and education was circulated to approximately 1000 practicing lawyers under the age of 36 of whom over 40 per cent, representing one tenth of all practicing attorneys in Iowa, responded. The results of the survey relating to personal data and types of work were summarized in a general report by Associate Professor Allan D. Vestal of the Law School of the State University of Iowa. A substantive law report, relating to the fields of substantive law dealt with by attorneys in communities of various sizes, was prepared by James F. Pickens, a senior law student at the university. This latter study considered cross correlations of the size of the community and income. The survey was first published in the *Iowa Law Review*, Volume 40, Number 1, (1954); requests for reprints should be directed to Mr. Fisher, Higley Building, Cedar Rapids, Iowa.

■ At the Annual Meeting in Philadelphia in August, 1955, there will be an election for the national offices of Chairman, Vice Chairman and Secretary to serve during the calendar year 1956. In addition Council representatives will be elected from the following Circuits: First, Third, Fifth, Seventh, Ninth, the District of Columbia, and the Fifth and Eighth-at-large. ON OR BEFORE JUNE 15, 1955, A NOMINATING PETITION MUST BE SUBMITTED IN ORDER FOR A CANDIDATE TO BE CONSIDERED BY THE NOMINATING COMMITTEE FOR NATIONAL OFFICES. Such petitions must be signed by at least twenty members of the Conference, and such petitions should be submitted to the Chairman in the manner set forth by Article 33, Section 4, Junior Bar Conference By-Laws. Nominating petitions in the form required by the By-Laws must also be submitted to the Chairman for the various offices of council representative and must be signed by at least five members of the Conference in the Circuit affected. ALL SUCH PETITIONS SHOULD BE SUBMITTED TO THE CHAIRMAN, STANLEY B. BALBACH, 102 NORTH BROADWAY, URBANA, ILLINOIS, NOT LATER THAN JUNE 15, 1955.

THOMAS G. MEEKER
National Secretary

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

COMPETITION. "Product Competition in the Relevant Market Under the Sherman Act"—Implicit in determining whether a defendant is a monopolist is the problem of defining the market in which he is alleged to have monopoly control or power. David MacDonald of the student editorial board of the *Michigan Law Review* discusses this subject in his school's November, 1954, issue. Mr. MacDonald attempts to formulate a test whereby the extent of the market in which the putative monopolist competes can be determined. Drawing on both economic theory and legal precedent, the author suggests that the relevant market includes all those products to which the average customer can change without substantial difficulty from the product of the putative monopolist. The article is concluded by a series of situations in which the theory is applied, tested and elaborated upon. (53 Michigan Law Review 69, Ann Arbor, Michigan; price $1.50.)

U. N. CHARTER REVISION—Richard F. Scott, a member of the California Bar, writes in the November issue of the *Michigan Law Review* (53 *Mich. L. Rev.* 39) on this subject. Since the possibility of amending the Charter of the United Nations will be on the agenda of the meeting of the General Assembly in the fall, this article has timely significance. The possible alternative legal methods of change are surveyed. Among them are renunciation, revolutionary displacement, international agreements consistent with but subordinate to the Charter, change in interpretation of and practices under the Charter, and formal amendment. The advantages and disadvantages of each are considered, along with their possible political consequences. Mr. Scott suggests that formal amendment is both unlikely and should be in favor of less sudden changes because it may be self-defeating as well as inhibitory of the present process of gradual international political adjustment. Write *Michigan Law Review* at Ann Arbor, Michigan, and send $1.50.

LAW'S DELAYS. The December, 1954, issue of *The St. John's Law Review* (Vol. 29, No. 1, price $2.50, Brooklyn, N.Y.) has an interesting article on the possibilities of procedural ramification, ("*The Case of Angelina* v. *Euclid*: A Study in Case Procedural Entanglements.") by Maurice Finkelstein. This is the third in a series of clinical studies likewise published in the same journal. (See: "The Case of The Beverly Hotel—A Study of the Judicial Process", *St. John's L. Rev.*, 261, 1953; and "The Case of the Broker's Commission", 28 *St. John's L. Rev.* 220, 1954.) The purpose of these articles is to reveal the inner workings of current litigation, from material that can be found in the lawyers' offices and not in the opinions of the courts or the printed record. The current article gives the history of a litigation which involved a comparatively small sum ($35,000). Yet, though the case was in the New York courts some two years and nine months, the merits were never decided and the real issues were consumed in a fiery crater of procedure. During the progress of the litigation, some thirty-two motions were made by one or the other parties; four appeals were taken to two departments of the appellate division, and one to the court of appeals. More than thirty-seven judicial decisions were made, participated in by at least forty-five judges. Yet the case was never decided and, as the author puts it, borrowing a World War I phrase, "was *spurlos versenkt*". The author draws no conclusions. He merely states the facts. But the detailed and dramatic account of these facts will cause many who had thought that such things were impossible in modern code states to wonder if there is really substance to what a certain character in *Oliver Twist* says about the law.

WIRETAPPING: Interest in this subject has been heightened in 1954 by two events: the wire-tap bills in the Congress and the monitored phone calls read in evidence at the McCarthy-Army hearings. There is no more interesting legal problem. New Yorkers well remember the animated debate in 1938 in the Constitutional Convention which led to the enactment of a New York law permitting wire-tapping by *ex parte* court order. Rather selfishly, I have been praying for a short clear article. It never rains but it pours. There are current three excellent ones: "The Public Security and Wire Tapping" by Herbert Brownell, Jr. (39 *Cornell Law Quarterly*, Ithaca, N.Y., pages 195-210; single issue: $1.25 Winter, 1954 issue); "The Case for Wire Tapping" by William P. Rodgers (63 *Yale Law Journal*, pages 792-798, April, 1954); and, "Comments and Caveats on the Wire Tapping Controversy" by Richard C. Donnelly (63 *Yale Law Journal*, pages 799-810, April, 1954). For the Yale issue send $2.00 to 401A Yale Station, New Haven, Connecticut. Not only is each of the three short and clear but each in its way is refreshing and different.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ The Denver Bar Association held its Annual Institute in February. The general subject was "State and Federal Laws Regulating the Public Sale of Securities". Because of the interest in oil and uranium in the state, the four sessions of the Institute were concerned with problems in these fields. The first session dealt specifically with the coverage of federal and state securities laws and exemptions and limitations. The remaining sessions covered the following topics: "The Underwriting Process;" "The Attorney Attempts To Comply with the Securities Laws and Regulations"; and "The Securities Commissioner and the SEC Take Over".

■ The First Florida Traffic Court Conference under the sponsorship of the General Extension Division of Florida, The Florida Bar and the College of Law, University of Florida, was held on the University of Florida campus, March 3-5, under the chairmanship of Harry Duncan, President of the Bar Association of the Eighth Judicial Circuit.

Judges, prosecutors, peace officers, justices of the peace and court clerks attended the conference which embraced consideration of new legal technical and scientific resources available to the prosecutor in the presentation and prosecution of traffic cases.

Cooperating in the conference were the American Bar Association; the Office of the Attorney General of the State of Florida; the County Judges' Association of Florida; Florida Association of County Attorneys; Florida Peace Officers' Association; Florida Sheriffs' Association; Florida League of Municipalities; Justices of the Peace and Constables' Association; Prosecuting Attorneys' Association of Florida and the Traffic Institute, Northwestern University.

■ The Fifth Annual Institute on Labor Law presented by the Southwestern Legal Foundation in cooperation with the Southern Methodist University School of Law was held on March 17 and 18 at the Southwestern Legal Foundation in Dallas, Texas.

The first day's program, which dealt with the Taft-Hartley Act, included a discussion on major developments in recent decisions of the National Labor Relations Board, unilateral changes by management and the latest N.L.R.B. decisions in regard to secondary boycotts. During the afternoon session a debate was held on preemption of state law by the Taft-Hartley Act, at which teams representing the Southern Methodist University School of Law and The University of Texas School of Law participated. These two teams took part in the finals of the National Moot Court Competition, sponsored by the Young Lawyers Committee of The Association of the Bar of the City of New York, which was held in New York last December.

Labor arbitration was the subject of the second day's program and among the topics discussed were, "Arbitration of Wage Disputes: Criteria for the Settlement of Wage Disputes"; Arbitration of Classification Grievances: Controlling Principles;" "Arbitration of Discharge Cases: Preparation by Counsel, Burden of Proof, Procedure, Making the Decision".

■ In February The Florida Bar and the Dade County Bar Association joined with the University of Miami School of Law in sponsoring the Second Annual Legal Ethics Institute.

The Institute which considered the dilemma of free press versus fair trial was opened with an introduction by Wesley A. Sturges, Dean Emeritus of Yale Law School and President of the Association of American Law Schools, and Dean R. A. Rasco of the University of Miami.

The Honorable Philbrick McCoy of the Superior Court of California discussed "The Argosy of a Law Suit". Journalists and representatives of the legal profession exchanged viewpoints on the rights of a free press. Canon 20 of the American Bar Association and Canon 35 of the Canons of Judicial Ethics were discussed.

Among the speakers were V. M. Newton, Jr., Managing Editor of the *Tampa Morning Tribune;* Alexander F. Jones, of the *Syracuse Herald Journal*; Louis Waldman, of New York.

The speaker at the concluding banquet was Chief Judge John J. Parker, of the United States Court of Appeals for the Fourth Circuit.

■ The Seventh Annual Meeting of the Interstate Bar Council, a Regional Conference of the eleven western state bar associations, was held at Casa Blanca Inn in Scottsdale, near Phoenix, Arizona, on February 25, 1955. The meeting is always held the Friday following the Midyear Meeting of the House of Delegates, with sufficient travel time allowed to permit the attendance of many of the delegates on their return from the Midyear Meeting. Some thirty-two delegates accompanied by their wives were present. Each state is permitted three delegates and for the most part, these usually consist of past and current presidents of the state bars and members of the House of Delegates of the American Bar Association from the West.

Arthur M. Davis, President of the State Bar of Arizona and Joseph P. Ralston, President of the Maricopa County Bar Association, made the welcoming remarks. Reports were given by each state delegation on

outstanding bar activities of the past year, followed by a round-table group discussion, with a question and answer period. Group discussions were largely related to admission standards, admission procedures, post-admission educational work, disciplinary procedures, public relations, improvement of the administration of justice and the unlawful practice of law, as well as free legal service rendered to the members of the legislature as a public service, in some of the states.

Walter E. Craig, of Phoenix, General Chairman of the Pacific Southwest Regional Meeting of the American Bar Association, was the speaker at the luncheon in the Moroccan Room. His subject, "What the Pacific Southwest Regional Meeting Has To Offer Your State Bar Members—A Preview". The date of the meeting in Phoenix was April 13 to April 16. A ladies' luncheon and fashion show was held in the patio by the pool side for the delegates' wives.

A preview of the 1955 Bar Association Public Relations Radio Program, developed by the Colorado Bar Association, was afforded by the playing of a sample recording, the presentation being made by William Hedges Robinson, Jr. of Denver, Past President of the Colorado Bar Association.

The new series is entitled "This Is America" and consists of thirteen radio programs of fifteen minutes each, with the underlying theme stressing Americanism. The sample record played, one of the series, points up the citizen's responsibility in exercising his right to vote. The principal narrator in the program is a radio news commentator, assisted by radio actors and with a copyright-cleared musical background, discussing matters and events in which lawyers lend a helping hand.

Outgoing officers were *President,* John Shaw Field, of Reno, Nevada, State Delegate; *Vice President,* Richard S. Munter, of Spokane, Washington, State Delegate, and *Secretary,* Leland W. Cummings, of Salt Lake City, Utah, State Bar Delegate, who had served as Secretary since the Council was formed.

New officers elected were *President,* H. Cleveland Hall, Great Falls, Montana, Past President of the Montana Bar Association; *Vice President,* Walter E. Craig, of Phoenix, Arizona, State Delegate and Past President of the State Bar of Arizona; *Secretary,* John H. Hollaway, of Portland, Oregon, Secretary of the Oregon State Bar.

At the invitation of Alfred M. Pence, of Laramie, Wyoming, Past President, and Joseph Spangler of Laramie, President of the Wyoming State Bar, the meeting next year will be held in Cheyenne, Wyoming, with the Laramie County Bar Association and the Wyoming State Bar as co-hosts.

A social hour in the Leopard Room was enjoyed by the delegates and wives, with the Board of Governors and wives of the State Bar of Arizona and the Board of Directors and wives of the Maricopa County Bar Association acting as hosts, followed by an informal dinner.

■ At its regular monthly meeting on February 11, 1955, at Tacoma, Washington, the Board of Governors of the Washington State Bar Association adopted the following resolution:

> RESOLVED, That the Washington State Bar Association in connection with any revision of Treasury Department Circular 230 recommends that no change in substance should be made in the existing provision now in said Treasury Department Circular 230 to the effect that the admission of non-lawyers as agents before the department shall not be deemed to authorize them directly or indirectly to engage in the practice of law.

■ The Ninth Legal Convention sponsored by The Law Council of Australia will be held at Brisbane from July 19—24. The Right Honourable Lord Reid, Lord of Appeal in Ordinary, will open the convention. The following papers will be discussed: "The Interpretation of Statutes" by Sir Herbert Mayo, of the South Australian Supreme Court Bench; "The Relationship of Law to Commercial Practice", by F. P. Donovan, Professor of Commercial Law at the University of Melbourne; and "Royal Commissions" by J. D. Holmes, Q.C., of the Sydney Bar. There will be a full program of social activities which will finish with a visit to Queensland's South Coast (Surfers' Paradise and Coolangatta) on Sunday, July 24.

It was the boast of Augustus . . . that he found Rome of brick and left it of marble. . . . But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.

—Brougham, 1828

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ **The following article was prepared by Mr. Forsse, an attache of the Swedish Embassy in Washington, as the result of a request made to the Ambassador, Dr. Erik Boheman, by the Editor-in-Charge. It is a further contribution to the series on legislative procedure in other countries which has appeared in the Journal from time to time.**

Legislation in Sweden

by Anders Forsse

■ The Swedish Instrument of Government Act of 1809, the oldest written constitution still in force with the exception of the Constitution of the United States, does not provide for a very distinct separation of powers between the executive, legislative and judicial branches of government. It is true that the framers of the Swedish Constitution were inspired to a great extent by the constitutional laws and debates of other nations, particularly those of France and the United States, and were well schooled in the doctrines of Montesquieu. But, like the British, they were primarily inspired by the history of their own country's constitutional practices and especially the experience of the preceding two centuries. This sense of affinity with the past was no doubt partly due to the fact that the Instrument of Government Act was not conceived as a result of any great upheaval comparable to the American and French Revolutions. True enough, in 1808 and 1809, Sweden was confronted with great difficulties: the 600-year-old tie with Finland was ruptured as the result of an unsuccessful war, the ruler was dethroned and the Constitution then in force was suspended. All the same, these events did not create any urge to depart radically from the historic pattern of government.

The concept phrased so pointedly by Thomas Jefferson that governments derive their just powers from the consent of the governed has been deeply rooted in the Swedish conscience since pre-Christian times, being based to a great extent on an age-old pattern of local self-government. It has been kept alive in spite of later European theories of government "by the grace of God", and notwithstanding periods of almost exclusive concentration of executive and legislative power in the King and his agencies.

The Swedish "founding fathers" understood their task as being one of preserving the rights of the people by framing the form of government in such a way as to avoid these absolute royal prerogatives, and also such excessive power of the parliament ("Riksdag") as had been tried unsuccessfully for some fifty years in the eighteenth century. Thereby, they hoped to create a constitution that, unlike earlier versions, would endure. The fact that the Instrument of Government Act of 1809, with a number of non-basic amendments, is still in force seems to prove that they were successful. It must be stressed, however, that the interpretation of the Act has become very liberal over the years, probably beyond what its authors could have foreseen.

What has now been said will serve to show why the Instrument of Government Act is less concerned with the separation-of-powers concept than with the necessity of "checks and balances", at any rate as far as legislative power is concerned. Its Article 87 provides that "the Riksdag shall, in concert with the King, have power to enact general civil and criminal law, and criminal law for the armed forces. . . . The King shall not without the consent of the Riksdag, neither shall the Riksdag without that of the King, make any new law or abolish any law in force. . . ." (It should be noted that the Executive is empowered, by laws thus enacted, to issue implementation rules—Royal Decrees—on its own. Also, it derives from its general functions the power to set forth regulations pertaining to the administration.)

The functioning of this "check and balance" provided for in the Constitution has been much modified with the gradual introduction of parliamentary government in Sweden. Firstly, the royal decisions are made by and with the advice of the cabinet only. Secondly, the cabinet is composed only of persons enjoying the confidence of the Riksdag, *i.e.*, of the party or parties that form the parliamentary majority; in fact, the cabinet members are, as a rule, members of the Riksdag. (Among the many and complex forces which brought about this development, one seems especially worth mentioning here: the Riksdag has, as expressly stated in the Instrument of Government Act, the exclusive power of taxation.)

The Cabinet, although a highly active and efficient body, can thus be said to usually represent the will of the Riksdag and legislative proposals are prepared and worked out in close collaboration by those two branches of the Government. They are greatly assisted in this task by a "check and balance" expressly envisaged in the Instrument of Government Act, namely the influence of the various government agencies and their officials, who traditionally enjoy a measure of independence under the law hardly paralleled in other countries (except possibly Finland.) Behind this independent attitude of administration officials lies the fact that a great number of them cannot be separated from their positions by the cabinet or the Riks-

dag but only through special judicial action. A further important force in the legislative work, although of more recent date, is the influence exercised by the large non-government organizations to whom bills are often referred for comment.

In this way, the modification of the pattern of government has to a large extent rendered inoperative the dualism of legislative power as foreseen in the Constitution. This does not mean, however, that the Instrument of Government Act is a dead letter. It is a fact, of course, that the cabinet has for all practical purposes assumed the powers of the king, somewhat in line with the development in Great Britain. But the cabinet and the Riksdag both expect —and get—a very thorough checking of their proposals by one another, and one always has to consider the influence of groups not directly represented in the cabinet, or in the majority party or majority coalition. Indeed, it may well be said that the mutual checking power provided for in the Constitution has, after all, been one of the most important forces in the development of the present-day close cooperation between the administration and the parliament in the drafting of bills.

Bills can originate in the administration as well as in the Riksdag (Art. 87). This means that administration bills ("Kungl. Maj:ts propositioner"—His Majesty's proposals) are submitted to the Riksdag as a body and are not—as is required in the United States—formally sponsored by individual members of the legislature. On the other hand, bills originating within the Riksdag ("motioner"), are of course submitted to that body by the member or members sponsoring them. If the Riksdag adopts these bills, they are reported by the Riksdag as a whole to the cabinet (or, to use the formal term, the King-in-Council) for approval.

The Riksdag may also present legislative proposals originating within itself to the cabinet without stating any position on those proposals but with the request that the administration prepare and investigate them and report them back in the form of royal proposals. Thus, many administration bills originate in the Riksdag.

The session of the Riksdag begins with an opening ceremony on January 10 each year, or, if that day is a holiday, on the first following working day. On that occasion, the intentions of the administration are outlined in the speech from the throne, which the king delivers in person. This "spring session" shall, as a rule, be terminated by May 31. If necessary—and this has been the case in recent years—there is also a fall session, to begin not earlier than October 16.

The Riksdag consists of two chambers. The first chamber has 150 members, elected by the provincial assemblies and by the city assemblies of such (large) cities as are not represented in the provincial assemblies. The term of office is eight years, one eighth of the members being elected each year. The second chamber has 230 members, all of which are elected proportionally and directly by universal suffrage every fourth year. The Riksdag has a number of standing committees which are, in principle, constituted jointly by the two chambers with one half of the committee members elected by and from each chamber.

The adoption by the Riksdag of a legislative proposal requires its approval by a simple majority in each one of the chambers. If the chambers reach different decisions, the competent committee tries to mediate between them; should this mediation fail, the proposal is considered as having been rejected. As far as practicable, bills are dealt with simultaneously in both Chambers.

The ways in which preparatory work on legislative proposals is carried on have already been described in their general outline. As far as administration bills are concerned, the proper ministry (department) assumes the primary responsibility but usually cooperates with other interested government agencies, often including the Ministry of Justice. This procedure of submitting the proposal to various interested parties is often very extensive in scope and may take a long time. During the last few decades the views of many non-government institutions, such as associations of management and labor, or industrial and similar organizations, have been sought on an increasing scale. There is also a standing Law Preparation Commission (*"lagberedningen"*), to which are assigned, from time to time, projects concerning laws of general importance, such as legislation on judicial procedure, or real estate. Furthermore, it often happens that a project is presented to a body of experts—a royal commission—which is appointed in each particular case by, or as a consequence of, a royal decree. There are a number of such commissions at work at present.

In the preparatory work there is usually a large layman influence, a feature rather characteristic of Sweden and unlike the expert representation in many special commissions instituted by the executive branch in the United States. A school teacher, or a clergyman, or a farmer is asked to think over, for example, a proposal for social legislation and give his views on it. The high regard for the common sense of the average intelligent citizen is of long standing in Sweden.

The proposal thus arrived at shall in most cases be submitted to the King's Law Council (*"lagradet"*), which has to pass primarily on the constitutionality of the measure and its consistency with previous law. The Law Council is composed of three justices of the Supreme Court and one member of the Supreme Administrative Court.

The bill in its final form shall be submitted to the whole cabinet (since the legislative power of the executive lies with "the King", not with any one cabinet member) and if agreed on, is presented to both chambers of the Riksdag.

The preparation of a bill by one or more Riksdag members can of course be carried out in many ways. Technically, the Riksdag, or its

committees or members, require the assent of the King in order to obtain the opinion or testimony of any Administration agency or official, but with the advent of parliamentarianism this assent is available on a standing basis. Unofficial comments may naturally also be obtained from contacts within the administration.

A legislative proposal, whether from the administration or from within the legislature, shall be submitted to the latter body within certain time limits, fixed in relation to the opening of the session. They shall be referred to the appropriate committee or committees, either at the plenary meeting during which they have been presented or at the following one, unless the chambers decide on a postponement. As a general rule, there is about one plenary meeting every week during the session.

Since the committees are usually made up to reflect the party influence in the chambers they can as a rule expect the Riksdag's consent to their suggestions. However, the Communist Party, which is represented by a few Riksdag members, no longer has any part in the committee activities. An important difference from the American practice is that the committees cannot "pigeon-hole" a bill, but must report it to the chambers before the end of the Riksdag's working year with recommendation for or against action, and with or without suggestions as to changes.

Since most of the investigation is done during the preparation of a bill before it is formally submitted to the Riksdag, the committees seldom, if ever, institute any hearings in the American manner, but testimonies from whatever source are usually submitted in writing.

The result of the Riksdag action is reported to the cabinet. If the report is concerned with a Riksdag bill, or an administration bill with changes suggested by the Riksdag, it is submitted to the Law Council and, if deemed necessary to other interested institutions. (In case of unchanged Administration bills, sufficient action by the Law Council has, as previously indicated, already been taken.) After the views of such bodies have been obtained, the cabinet decides whether the act shall be promulgated by the King-in-Council, thereby made law of the land.

Mr. Justice Horace Gray

(Continued from page 424)

or expel aliens, absolutely or conditionally, in peace or wartime was held to be an inherent sovereign right. In *United States* v. *Wong Kim Ark,* 169 U.S. 649 (1898), Gray held that a child born in the United States of Chinese parents residing here permanently and not employed in a diplomatic or official capacity by the Chinese government was a citizen of the United States under the Fourteenth Amendment.

But had Gray been the nationalist which he was acclaimed he might well have taken a different stand in the insular cases. As it was he followed a middle course between the extremes of his colleagues on either side. Involved was the relationship of newly acquired Puerto Rico and the Philippines to the United States and the application of the Dingley tariff. Sugar interests had a big stake in the outcome. In *DeLima* v. *Bidwell,* 182 U.S. 1 (1901), Justice Brown held that upon the cession of the territories by Spain to the United States they became domestic and the Dingley tariff became immediately inoperative, since it applied only to foreign territory. McKenna's dissent, in which Shiras and White concurred, held that "Puerto Rico occupied a relation to the United States between that of being a foreign country absolutely and of being domestic territory absolutely". Gray, in a short dissent, said that the majority opinion was not reconcilable with *Downes* v. *Bidwell.*

In *Downes* v. *Bidwell,* 182 U.S. 244 (1901), there was no majority opinion. Brown "announced the conclusion and judgment of the Court" delivering an opinion of his own in which he held that Puerto Rico was not a part of the United States within the constitutional provision declaring that "all duties, imposts, and excises shall be uniform throughout the United States" and upheld the tariff provisions of the Foraker Act. Since the framers of the Constitution had not considered territorial acquisitions Brown left Congress wide latitude in such matters. Here the color pattern changed, Brown instead of Gray became the great nationalist. White expressed a concurring judgment for himself, Shiras and McKenna. Upon acquisition by the United States of foreign territory, he said, such territory ceases to be foreign, but to become part of the United States it must be "incorporated" by Congress. The act of incorporation need not be formal but may be inferred from the manner in which Congress legislates with respect to the territory. Gray, in a brief concurring opinion in substantial agreement with White's, declared that the civil government of the United States could not be extended immediately over territory acquired by war, but that such territory must pass through a period of transition under military rule and while in this condition it is not domestic within the meaning of the revenue laws.

Leeway for the States . . . *Dissent in Leisy v. Hardin*

In matters of regulatory legislation Gray allowed considerable leeway to states. One of his famous dissents was in *Leisy* v. *Hardin,* 135 U.S. 100 (1890), the original-package case. Fuller, for the majority, held an Iowa prohibitory liquor law void as applied to liquors imported into the state in the original packages. The act, said Fuller, interfered with interstate commerce, a field in which Congress' power was exclusive. Gray's dissent, with Harlan and Brewer con-

curring, upheld the act as a legitimate exercise of state police power. Congress's right to legislate on such matters was held to be paramount but not exclusive; in the absence of congressional laws the state was free to act. *Leisy* v. *Hardin* led to passage of the Wilson Act of 1890 which subjected intoxicating liquors transported into a state to state laws upon arrival.

Gray stood with the majority in *Plumley* v. *Massachusetts*, 155 U.S. 461 (1894), which upheld state legislation against importation of oleomargarine as a proper health measure within the state's police powers. In *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U.S. 18 (1891), he held that a tax on a portion of a company's capital stock was not a violation of the interstate commerce clause. A state's legislative power, he said, extends to all property, personal as well as real, within its borders. In *Massachusetts* v. *Western Union Telegraph Company*, 141 U.S. 40 (1891), Gray upheld a tax levied nominally upon shares of the company's stock but actually on property of the company owned and used in Massachusetts.

Gray was also partial to state railroad regulation in fields where Congress had not entered. Popular dissatisfaction with railroads had come to a head with the organization of the Granges in the early 70's. Largely through the influence of this movement, a series of laws was enacted aimed at rate discriminations, excessive charges, regulation of grain elevators and the like. The right of states to pass such legislation was upheld by Chief Justice Waite in *Munn* v. *Illinois*, 94 U.S. 113 (1876), but within ten years changes in the Court's personnel brought judges with different views of property rights, due process and the commerce clause, and efforts toward state regulation received numerous checks, the most serious of which came in the *Wabash* and Minnesota rate cases. Gray and Waite concurred with Bradley's dissent in the *Wabash* case, 118 U.S. 557 (1886), where the effect of the majority opinion was to overrule in part *Munn* v. *Illinois* and other early Granger cases. The *Wabash* case invalidated an Illinois law against charging lower rates for longer than for shorter hauls (the long-short haul) as an interference with interstate commerce. State regulation, held the majority, must confine itself to intrastate commerce, and even where there was no federal legislation the state was declared powerless to act. This decision was one of the factors leading to the establishment of the Interstate Commerce Commission the following year.

In *Dow* v. *Beidelman*, 125 U.S. 680 (1888), Gray followed the *Munn* case in upholding a state statute classifying railroads according to the lengths of their lines and fixing different limits for passenger fares in each class. He was with the minority in the Minnesota rate cases, 134 U.S. 418 (1890), which virtually overruled *Munn* v. *Illinois*. Here the majority threw out a state law allowing a railroad commission to fix final rates and forbidding the courts from staying the commission's hand even though rates might be unequal and unreasonable. In *Gladson* v. *Minnesota*, 166 U.S. 427 (1886), Gray upheld state laws requiring trains to stop at county seats and in *St. Louis and San Francisco Railroad Co.* v. *Mathews*, 165 U.S. 1 (1896), declared that states could make railroads liable for damages caused by fire from locomotive engines.

Despite his stand on state regulation of railroads Gray opposed granting broad regulatory powers to the Interstate Commerce Commission and supported the majority in a number of cases coming up in the 90's which limited seriously the powers of the commission. All this does not square with the view of Gray as a great nationalist. His attitude toward state regulation was more generous than that of his colleagues, Field, Brewer, Fuller and Matthews. He did not use the due process and commerce clauses to strike down legislation or to confine state regulation to narrow limits. In matters affecting interstate commerce he was willing that the state should act until Congress entered the field. In fact he was more tolerant of state than of national attempts at such regulation.

One of the most unsatisfactory decisions in the Court's history was handed down in *Pollock* v. *Farmers' Loan and Trust Company*, 157 U.S. 654, and 158 U.S. 601 (1895), where a 2 per cent income tax provision in the Wilson-Gorman tariff act of 1894 was invalidated. Demand for an income tax had been growing; there was an income tax plank in the Populist platform of 1892, and the idea was favorably regarded by many in the two older parties. Growth in the number of large incomes at a time when farmers' difficulties were increasing influenced many to favor a more balanced system of taxation. The Wilson Act provided for a 2 per cent tax on individual and corporation incomes in excess of $4000 with exemptions for religious and charitable organizations, building and loan associations, savings banks and mutual insurance companies. Fierce opposition arose from conservative elements; the tax was regarded as a threat to property rights. Failing to prevent its passage through Congress, opponents forced a test case and retained an imposing battery of attorneys, among whom were Joseph Choate, William D. Guthrie and Senator George F. Edmonds, of Vermont.

Two full hearings were necessary. After the first, Chief Justice Fuller held that the tax as applied to income from rents, real estate, or municipal bonds was a direct tax and hence void. White and Harlan dissented. Upon the question as to whether the void provisions of the law invalidated the whole act; whether as to income from personal property the act was unconstitutional as laying a direct tax; or whether any part of the tax if not considered direct, was invalid for want of uniformity on either of the grounds suggested, the Chief Justice stated that the Court was divided four to four. Justice Jackson was absent because of illness. Field delivered a vigorous concurring opinion holding the entire act void. This left matters in a

very unsatisfactory state; the act was seriously weakened but still stood. A month later the Court granted a rehearing before the full Bench. In the decision which followed, Chief Justice Fuller ruled out the entire act, holding that the tax on income from rents and personal property was direct. He cited no cases for the very good reason that all past precedents favored the tax.[27] Justice White, dissenting, called the majority decision "A judicial amendment to the constitution." Harlan dissented heatedly, and when he intimated "that the majority opinion was influenced by the argument that the law had been enacted by votes of Senators and members from states that would least bear the burden he seemed to ignore everybody in the chamber but Justice Gray."[28] This is interesting in view of Gray's relation to the case.

A Historical Mystery . . . *Did Gray Change His Vote?*

The Court was attacked fiercely from many quarters. Its position was vulnerable. In the first case the division had been four to four with Justice Jackson, who favored the law, absent. In the second, Jackson upheld the law, but one of the other members shifted his position. There was no way of determining who. Six Justices could easily be eliminated, Fuller who delivered both majority decisions; Field, whose opinion concurred with the majority; and the four who dissented. This left Shiras, Brewer and Gray. In their issues of May 21, 1895, the *New York Times* and the *New York Tribune* accused Shiras. The charge has been perpetuated in many historical works and accepted widely.[29] Since then, however, substantial but not conclusive evidence has been brought forth to clear him.[30]

The positions of Justices Gray and Brewer are something of a mystery. Charles Warren stated that Mr. Maher, a former clerk of the Supreme Court, told him privately that Gray may have been the Justice who changed his opinion. But Mr. Warren, who knew Gray personally, added that he did not believe it possible that the Justice would have allowed the charges against Shiras to go uncontradicted if Gray himself had been responsible.[31] Apparently first to publicize the suggestion that it may have been Gray was Professor Corwin in *The Twilight of the Supreme Court* (page 210, note 107). Corwin stated erroneously that Gray was with the majority in *Springer* v. *United States,* 102 U.S. 586 (1880), where a federal income tax was upheld on the grounds that it was not "direct". Actually Gray was not then a member of the Court.

Nevertheless Professor Corwin still maintained that the shifting Justice was more likely Gray than Brewer.[32] His arguments, able but not entirely convincing, are set forth in *Court over Constitution* (pages 199-200).

> Nor is the case for Gray a merely negative one. His final presence among the Justices opposed to the act is certainly something which requires to be explained on its own account. Gray was for years, except for Bradley, the strongest nationalist on the bench, as is shown by such opinions as those in Julliard vs. Greenman, Jones vs. United States, the Fong Yue Ting Case, and so on. Furthermore, Gray was an old school judge, a product of the Civil War,[33] and not especially alert to the property question, while Brewer was perhaps the most property-conscious Justice on the bench at that time. Also, Gray was a very learned man and a great precedent judge, whereas the Pollock Case played "ducks and drakes" with the precedents. For all which reasons, the surprising thing would be not that Gray was the last Justice to line up against the act, but that he should have done so at all.
>
> Finally it is the tradition of the court that Gray was the Justice who changed his mind, a fact which I have from first hand sources. Indeed, the strength of the case for—or against—Gray affords better grounds for exonerating Shiras than any thus put forward by the latter's own defenders.

That Gray was a strong nationalist during his earlier days on the Supreme Court Bench is beyond question, but later there was a change. His position in *Brown* v. *Walker,* 166 U.S. 591 (1896), and in other cases involving the Interstate Commerce Act was certainly not that of a nationalist, and his stand in the insular cases was less nationalistic than Brown's. When the income tax decision was handed down Gray was one of the old school. As a Free Soiler and an early Republican, he had not hesitated to take a radically unpopular stand when a matter of principle was involved. Probably he became more conservative as he grew older, and it could well have been, that, like many others, he became alarmed over threats against property which an income tax implied. But if he did change his position on the *Pollock* case, which he had every right to do, it seems amazing, in view of his integrity and forthrightness, that he did not make it known. That he should have allowed his colleague Shiras to suffer on his account seems beyond belief. There is little more that can be added. Roland C. Gray, nephew of the Justice and his secretary in 1898-1899, stated in a letter to Harold Davis (January 24, 1938) that he had never heard it suggested that his uncle had changed his vote and that Charles L. Barlow, who was Justice Gray's secretary two years earlier, had heard nothing to that effect. That the question will ever be solved seems improbable.

Late in his career Gray delivered three important opinions in the field of international law. *Hilton* v. *Guyot,* 159 U.S. 133 (1895), raised the question as to whether a judg-

27. *Hilton* v. *U.S.,* 3 Dallas 171 (1796); *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433 (1868); *Veazie Bank* v. *Fenno,* 8 Wall. 533 (1869); *Sholey* v. *Rew,* 23 Wall. 331 (1874); *Springer* v. *U.S.,* 102 U.S. 568 (1880).

28. Swisher, *op. cit.* page 411.

29. Myers, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Chicago, 1912) page 616; Warren, *op. cit.,* Volume II, page 700.

30. Hughes, Charles Evans, THE SUPREME COURT OF THE UNITED STATES (New York, 1928) page 54; Nevins, GROVER CLEVELAND, appendix II; Ratner, "A Vindication of Justice Shiras", (MS.), and AMERICAN TAXATION (New York, 1942). We are indebted to Dr. Ratner for permission to read his unpublished manuscript on Justice Shiras.

31. Ratner, "A Vindication of Justice Shiras".

32. Dr. Sidney Ratner in "A Vindication of Justice Shiras" summed up the scanty evidence against Justice Brewer, but has been convinced that the vacillating Justice was probably Gray. AMERICAN TAXATION, page 210.

33. This statement is not quite accurate. Gray was a Free Soiler, an abolitionist, and an early Republican, but he took no part in the Civil War.

ment recovered by an American in France created an absolute enforceable obligation in the United States. Gray held that it was accepted international practice among nations to recognize foreign judgments and decisions only as a matter of comity. The French judgment in question was held to be subject to re-examination and was to be treated only as evidence. In the *Paquete Habana*, 175 U.S. 677 (1900), it was decided that coastal fishing vessels, with their supplies, cargoes and crews, if unarmed and engaged in their calling, were exempt from capture as *prizes* of war. This position was based on the general consent of civilized nations aside from any express treaty; it was an established rule of international law founded on considerations of humanity and of the mutual convenience of belligerents. The case involved seizures of two Cuban fishing boats by a U. S. warship during the Spanish-American War. International law, Gray, held, is a part of our law, and where there is no treaty, law or judicial decision by which it can be determined, it must be found in the customs and usages of civilized nations and in the works of learned writers. In *Tucker* v. *Alexander*, 183 U.S. 424, 499 (1902), Gray dissenting declared that the Federal Government was without power under its treaty of 1832 with Russia, or otherwise, to surrender a deserter from a Russian ship under construction in Philadelphia to the Russian government. Such treaties were to be strictly construed, said Gray, and the United States Government was not obliged by comity to return fugitives to other nations.

In a number of cases Gray dealt with various aspects of civil rights. In *Logan* v. *United States*, 144 U.S. 263 (1891), he reaffirmed *In re Neagle*, 135 U.S. 1 (1890), holding it to be the duty of the Federal Government to protect those held in custody on criminal charges as well as officers of the law. The powers of Congress to afford such protection were held to be very broad. In a seventy-one page dissent in *Sparf* v. *Hansen*, 156 U.S. 51 (1894), in which Shiras concurred, Gray held that the U.S. Circuit Court's instruction to the jury in a trial for murder on the high seas deprived defendants of their right to have the jury decide on the law involved. He stated that it was customary for the jury to take the law from the court's instruction, but in cases where they disagreed with the law as laid down by the court they were free to decide it otherwise. In *Capital Traction Company* v. *Hof*, 174 U.S. 1 (1899), Gray reviewed the history of trial by jury. Defining a jury trial as a trial before a jury of twelve presided over by a judge duly qualified to instruct on points of the law, he held that trial before a jury of twelve with a justice of the peace presiding did not constitute a jury trial within the meaning of the Seventh Amendment. A congressional act of 1895 extending power to justices of the peace to preside over certain types of cases was upheld. In *Carter* v. *Texas*, 177 U.S. 442 (1900), he declared that whenever a state, through its legislature, judiciary, or its executive or administrative officers, excluded Negroes, solely on the grounds of race or color, the latter were denied equal protection of the laws under the Fourteenth Amendment.

Outside of the strictly constitutional field, Gray delivered important opinions on the original and appellate jurisdiction of the Supreme Court, admiralty and maritime law, on the law of patents, and of contracts. In all he delivered 451 decisions, ten of which were dissents; during his whole career he dissented in only fifty-one cases. According to Samuel Williston, once his secretary, the Justice refrained from dissents as much as possible because he felt they weakened the Court's prestige.

An evaluation of Gray's career is not easy. A thorough student and a tireless worker, he devoted practically all his time to legal study. He was active almost until the close of his career, and in 1902, the year of his death, he delivered an able and carefully reasoned opinion in *Nutting* v. *Massachusetts*, 183 U.S. 553 (1902). His knowledge of common law probably equaled that of Holmes, his successor. In nearly every case his decisions are bolstered by precedents and confined to the matter immediately under consideration. *Obiter dicta* are rare. Unlike his colleagues Field, Brewer, Miller and Matthews he was not a believer in the doctrine of the "higher law" and "natural law"; nor, as Professor Corwin said, did he make property rights the central point in his constitutional interpretations. Neither did he make free use of the due process clause, equal protection of the laws, or the commerce clause to strike down regulatory legislation in the interests of railroads or big business. Nor was he inclined to extend the powers of the judiciary to such lengths as did some of his colleagues. He was in no sense a "liberal", however, and it may well have been that in the income tax cases his concern for conservative financial principles was strong enough to overcome his nationalism and his desire to follow well-established precedents. Something of the kind might be inferred from Harlan's behavior when he delivered his dissent in the second *Pollock* case. Then again his interpretation of the fellow-servant rule was less generous than that of Field. Precedents here were too strong to be moved by humane considerations. He lacked Holmes's broad tolerance and grasp of contemporary social questions and the personal charm of Holmes. His friends and intimates were all members of his own circle, though his ability as a jurist won him wide respect. Indicative of this is a letter of Theodore Roosevelt to Henry Cabot Lodge shortly before Gray's death, when Holmes was being considered as his successor.

> Judge Gray [Roosevelt wrote] has been one of the most valuable members of the court. I should hold myself as guilty of an irreparable wrong to the nation if I should put in his place any man who was not absolutely sane and sound on the great national policies for which we stand in public life.

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on the record made, that is, facts proved, before the Tax Court; the appellate courts will not hear or consider new and different evidence than was considered by the Tax Court. It is important that the taxpayer's case not be thrown away at the Tax Court level by a failure to allege or prove vital facts.

SUIT FOR REFUND. The alternative to appealing the controversy to the Tax Court is to pay the tax, file a claim for refund properly presenting the issues involved, and then sue for refund in a United States District Court or the Court of Claims, where the same rules of law apply as in the Tax Court. Appeals from the District Courts lie to the same United States Courts of Appeals, but decisions of the Court of Claims may be reviewed only by the Supreme Court.

The choice of the forum, as between the Tax Court, on the one hand, and a District Court or the Court of Claims on the other, rests with the taxpayer. The exercise of his election as between the two courses open to him may be of critical importance.

Because this choice involves an analysis and appraisal of the decisions on the same or closely related issues by each of these courts, and because, once the election is made, it may not be changed, it is essential that a lawyer's advice be obtained before the choice is made. It is too late to make the choice after the case has been started in the Tax Court by the filing of a petition.

What the Certified Public Accountants Seek

The campaign launched by the American Institute of Accountants has been on two fronts.

The major effort has taken the form of urging the Treasury Department to change its long-standing rule of not interfering with the regulation of law practice by the states. Specifically, the Institute has asked the Treasury to delete from its rules governing the practice of nonlawyers before the Department the following *proviso,* which has been a part of the rules for over a quarter of a century:

> . . . *provided further,* That nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.

The Association's opposition to the deletion of this provision was set forth at length in a statement to the Secretary of the Treasury on September 28, 1954. That statement was published in the AMERICAN BAR ASSOCIATION JOURNAL of November, 1954, and will not be repeated here, except to reiterate the Association's view that the public interest requires that only lawyers be permitted to engage in the practice of law, and that the Treasury should continue to recognize the primary obligation of the states to regulate law practice.

The second effort of the Institute is in Congress, where it has secured the introduction of bills which would have the effect of granting to non-lawyers a federal license to practice law in the tax field. This obviously has the same objective as the campaign for getting the Treasury to change its rules.

The reason advanced by the Institute for sponsoring this drastic change in the existing rules is that certain state court decisions in recent years, it is alleged, have created "confusion" as to the proper role of the certified public accountant in the federal tax field. In the pamphlet "Helping the Taxpayer", reference is made to five state court decisions. Four of them are not named (though they are readily identifiable), and there is no statement of the relevant facts in any of these cases. The cases in question are as follows:

The Massachusetts Case: Lowell Bar Association v. *Loeb,* 315 Mass. 176, 53 N.E. 2d 27 (1943).

The New York Case: Application of New York County Lawyers Ass'n., In re Bercu, 273 App. Div. 524, 78 N.Y.S. 2d 209 (1948), affirmed per curiam, 299 N.Y. 728, 87 N.E. 2d 451 (1949).

The Minnesota Case: Gardner v. *Conway,* 234 Minn. 468, 48 N.W. 2d 788 (1951).

The Florida Case: Petition of Kearney, 63 So. 2d 630 (1953).

The California Case: Agran v. *Shapiro* (Appellate Dept., Superior Court, County of Los Angeles), 127 A.C.A. Supp. 129 (1954).

It is apparent that the first three cases were fully known to the accountants before they signed the Statement of Principles. The Florida case involved practice by a lawyer, not by an accountant. The remaining case *(Agran* v. *Shapiro, supra)* specifically recognized the right of an accountant to prepare tax returns, but denied him the right to brief and argue what he admitted was a difficult question of law, involving many days of legal research.

None of these cases held that the preparation of a tax return or a claim for refund, or the representation of a taxpayer before the Treasury Department, in and of itself, constituted the practice of law. As the California court pointed out, the Statement of Principles recognizes the propriety of such activities except where the problem is one involving a legal question.

The Position of The American Bar Association

The pamphlet "Helping the Taxpayer" asserts that the lawyers are seeking to deprive taxpayers of the services of accountants, and editorials in the Institute's official organ have charged the American Bar Association with taking the position that the "entire field of Federal tax practice should be exclusively reserved for lawyers".

These statements are incorrect. They are refuted by the facts presented herein.

The position of the American Bar Association is that set forth in the Statement of Principles referred to earlier. "Helping the Taxpayer" ignores the existence of this Statement of Principles, as do all of the editorial comments on the subject in the *Journal of Accountancy.* Yet this Statement, immediately after its adoption by the two professional

organizations, was announced in the *Journal of Accountancy* in June, 1951, with the following editorial comment:

> Lawyers and CPAs moved a step closer to eliminating their differences over tax practice this month when [the] Council of the American Institute of Accountants approved a statement of principles defining the *proper areas* of practice in federal tax matters by members of the two professions. The Board of Governors and House of Delegates of the American Bar Association had previously approved it. (Italics supplied.)

From an examination of the Statement of Principles, it is apparent that the two professions, after prolonged and careful discussion, agreed some four years ago that the question of whether it is proper for an accountant to (a) prepare an income tax return, (b) advise a taxpayer on the probable income tax effects of business transactions, (c) represent a taxpayer before the Treasury Department, or (d) prepare a claim for refund of income taxes paid, is to be answered by an examination of the *nature* of the problem; that questions of law should be passed upon, in *each* of these situations, by lawyers, and questions of accounting by accountants; that the skills of each are essential to the protection of the varied interests of taxpayers; and that neither has, or should have, a monopoly in the field of advising or representing people in connection with tax problems.

This is still the position of the American Bar Association.

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Nature, Man and Law

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centuries, one may find many instances of devout, God-fearing people who were so certain of their own rectitude and morality that they were willing to perpetrate the most inhuman tortures upon others because they entertained different beliefs. There were the many years of the Inquisition when deeply dedicated men, sure that they were carrying out the will of God, burned, boiled, beheaded and disemboweled thousands of their fellow men because they held different beliefs. There are the accounts of the imprisonment of Galileo and the burning of Bruno because they rejected the view that the sun revolved about the earth. In the interminable and meandering stream of events, what were once heresies later became orthodoxies. Things once incredible became commonplace. The human mind has not even yet divested itself of its ancient frailties. Witness the comparatively recent condemnation of millions of innocent people to death in gas chambers, to imprisonment in slave labor camps and to banishment in the salt mines because of the certitude of their condemners as to their own racial superiority or the infallibility of their political systems. Should not this experience give us pause in asserting the universality of what at the moment appears to us to be true?

Exponents of classical natural law are usually able to find or create natural law principles which support what they want to believe. Before the adoption of the Constitution, both the federalists and the anti-federalists claimed support from natural law. Before the Civil War both pro-slavery and anti-slavery advocates invoked natural law as the basis for their views.[29] In *Green* v. *Alabama,* the Supreme Court of Alabama affirmed the conviction and sentencing of a white woman to two years in the penitentiary for marrying a Negro contrary to a statute of that state. In support of its conclusion the court said, "Why the Creator made one white and the other black we do not know; but the fact is apparent . . . the races are distinct, each producing its own kind and following the peculiar law of its constitution. Conceding equality . . . yet God has made them dissimilar. . . . The natural law, which forbids their intermarriage, and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures."[30] In a Pennsylvania case this same argument was used to justify racial segregation on common carriers.[31] During the nineteenth and early twentieth centuries the opposition to legislation prohibiting child labor, reducing working hours for women, and improving working conditions in hazardous industries, was based partly upon the principle that by natural law, freedom of contract could not be interfered with by legislation.[32]

Mr. Justice Holmes has been one of the great critics of the classical natural law theory. He said, "The jurists who believe in natural law seem to me to be in that naïve state of mind, that accepts what has been

29. See Le Boutillier *op. cit.* 64-65.
30. *Green* v. *Alabama,* 58 Ala. 190 at 194 (1877).
31. *West Chester* v. *Miles* 55 Pa. St. 209 (1867).
32. See *Lochner* v. *New York,* 198 U. S. 45 (1905).

familiar, and accepted by them and their neighbors, as something that must be accepted by all men everywhere."[33] Holmes believed that "Certitude is not the test of certainty", and that "we have been cock-sure of many things that were not so".[34]

Yet Holmes had deep faith and firm convictions. "When I say that a thing is true", said he, "I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are the inabilities of the universe."[35] Holmes did not believe that his "can't help" decisions were based on principles of universal application, for he said, "I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so, leaves one able to see that others, poor souls, may be equally dogmatic about something else."[36]

Defenders of natural law have vehemently attacked the views of Holmes. Harold R. McKinnon, one of his sharpest critics, has summed up his criticism in these words: "[Holmes's] philosophy is a symbol of our intellectual wretchedness, a conspicuous example of our abandonment of those spiritual, philosophical and moral truths that have been the life of the western tradition, the foundation of our law and the strength of our republic."[37]

The Views of Holmes . . . *Fortified by the Sciences*

It is my belief, however, that the views of Holmes have been fortified by the developments in the natural sciences in the last half century. If scientific principles are not absolute, if they must be regarded as tentative and always subject to re-examination and revision, if a Newton must revise a Kepler and an Einstein revise a Newton, there would seem to be all the more reason why the principles of law should be subjected to the same treatment. In law, we have found that a Blackstone must revise a Bracton, and a Kent revise a Blackstone. In contract law a Williston must revise a Pollock, and a Corbin revise a Williston.

If Holmes's conscience leads him to say that a course of action is bad and Harold McKinnon's conscience leads him to say that the same course of action is bad, it may be asked what difference does it make that Holmes calls his a "can't help" decision and McKinnon a decision dictated by the natural law? Both decisions are based upon an instinctive feeling or emotional reaction of wrongness that has been created by the individual's inherited capacities, experience or environment; or by the customs, mores or culture of his people and time; or by God working directly or indirectly through the other media. The important consideration is that there is something in each man that causes him to reach the conclusion that the action is wrong. If we argue about what to call this something, are we arguing only about words and not about substance? Perhaps we are. If Holmes's conscience leads him to believe that a course of action is good and McKinnon's that it is bad, is there more reason for saying that McKinnon is right because he believes his feeling to be dictated by a principle of natural law than for saying that Holmes is right who "can't help" deciding as he does? Perhaps in many cases, there is no convincing reason for preferring one view over the other.

And yet I believe there is an important difference between the two theories. Holmes, unlike the natural law man, did not believe that because he firmly held certain views, they were necessarily universal or infallible truths, or that the acceptance of them by others was essential to the preservation of civilization or the republic. His "can't help" theory was always subject to revision in the light of new conditions or new experience. The classical natural law on the other hand, by definition, must forever remain unchanged. While experience has required its devotees to recede from this position from time to time, by hypothesis the system is immutable. No amount of experience or new light may be used as the basis for altering or revising it. It seems to me therefore, that the Holmes' view makes possible the continuous advance of the standards of human conduct, whereas the natural law view, having in theory already attained perfection, retards it.

And yet the critics of Holmes say that his legal philosophy is based upon what the "crowd" wants and that it is indifferent to morals. It is believed that these criticisms are unjustified. One of Holmes's outstanding qualities as a judge was that he was motivated by moral considerations in deciding cases. His decisions are noted for being based upon his conception of what the law *ought to be,* rather than simply upon what the law *is*. With him the least persuasive reason for a decision was that it had been so decided before. How can one explain his many dissenting opinions (most of which have since

33. Holmes, COLLECTED LEGAL PAPERS (1920) 312.
34. Holmes, *id.* 311.
35. Holmes, *id.* 304-305.
36. Holmes, *id.* 311.
37. Harold R. McKinnon, *The Secret of Mr. Justice Holmes,* 36 A.B.A.J. 261 (1950). Other critical articles are Ben W. Palmer, *Hobbes, Holmes and Hitler,* 31 A.B.A.J. 569 (1945) and Palmer, *Defense Against Leviathan,* 32 A.B.A.J. 328 (1946).

become law) except upon the ground that he was trying to make the law *what it ought to be*? Why did he render dissent after dissent to a principle that had strong popular support, the approval of a legislature, of a trial court, of a court of appeals, and of a majority of his own associates on the United States Supreme Court if he always believed that right was what the majority said it was?[38]

Holmes was not an outstanding economist nor an eminent sociologist, but without being a moralizer, he was a tremendous force for morality in the law. He believed in "the power of honor to bind men's lives"; that "if a man is great he makes others believe in greatness"; that a great man is one who makes others "incapable of mean ideals and easy satisfactions"; that "the root of joy as of duty is to put out all one's powers toward some great end" with the "hope that the world would be a little better for his striving"; that "the business of a law school" is not merely "to teach law or make lawyers. It is to teach law in the grand manner and to make great lawyers." He believed that "the law is the witness and external deposit of our moral life", and that its "history is the history of the moral development of the race". He had faith that "man like the grub that prepares the chamber for the winged thing it is to be . . . that man has cosmic destinies that he does not understand", and "beyond the vision of battling races and an impoverished earth" he caught "a dreaming glimpse of peace".[39]

These are mere "fragments of [Holmes's] fleece" which he left upon the "hedges of life", but when read in the setting of his judicial opinions, they reveal a faith and an idealism unmatched in all the literature of the law.[40]

A Law of Nature . . . *Man Is Diversified*

However, there is another concept of natural law that avoids the pitfalls of the classical theory, which seems to me more tenable than the old and which is also completely compatible with the views of Holmes. This theory recognizes that men naturally differ widely in ability and experience, in their interpretation of objective phenomena and in their emotional reactions to stimuli. There is wide variety in men's powers of imagination, in their sensitivity to beauty, poetry, art and music, in their attitudes toward love, sympathy, sacrifice, charity and honor, and in their response to religious rituals. These capacities and attitudes change from time to time, from nation to nation, from group to group, from family to family, from man to man. Man is not like the robin, the same now as always, the same here as elsewhere, one individual like every other individual. It is contrary to his nature to have uniformity in aptitude, in preference, in feeling, in taste, in attitude toward fellows. By nature his thought does not conform to any given standard. Is it not then in accordance with the *law of nature* that men, differing in background, tradition, experience, taste and aptitude should also differ in ideas, judgments, ideals and faiths? Is it not as much the law of nature for men to be thus diversified as it is for robins to be uniform in their pattern of existence? This attribute sets man off from other animals. Why should it be contended, as it is by some, that this attribute is contrary to the law of God, and that unless man fits his thought and faith into a specified pattern, he has committed an offense against the law of nature? The nonacceptance by some men of this characteristic of diversification in man as a part of the law of nature has caused many of the world's most oppressive tyrannies and bloodiest wars. Are we even now aware of man's true nature?

The natural law which seems deducible from the diversified nature of man is that each man *ought* to recognize and accept as natural the differences in other men and not forcibly try to eradicate them because they are incompatible with his own beliefs. Experience suggests that respect and tolerance for the beliefs of one another, rather than the acceptance of the absoluteness of any one belief, is the key to truth, the way to peace and the preservation of civilization. In view of the vastness of man's ignorance and the frequency of his past errors, it seems reasonable to believe that eternal and infallible rules for his guidance have not yet evolved and that it is folly for him to be dogmatic concerning such matters. The grand strategy for man's discovery of truth seems to be not so much by means of instantaneous revelation to one or a few men (though this is not excluded) as by means of effort, of trial and error, experimentation, research, thinking, meditation, worship and the intercommunication of ideas and feelings among all men everywhere and over many thousands of years of time. That which results from the accumulated experiences and insights of all men comprising the human race at any given time is likely to be the nearest approach to truth. This very process has caused man, in many instances, to repudiate laws previously believed to be absolute. While it seems evident that the human mind has moved toward truth rather than

38. See, *e.g.*, *Northern Securities Co.* v. U. S., 193 U. S. 197 (1904); *Gitlow* v. *New York*, 268 U. S. 652 (1924); *Abrams* v. *U. S.*, 250 U.S. 616 (1919).

39. Quotations in this paragraph are from Holmes, SPEECHES (1934) 26, 30, 32, 63, 97, 103 and his COLLECTED LEGAL PAPERS (1920) 170.

40. See Lief, THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES (1929).

away from it, it seems obvious that truth has not yet been attained.

It should be clear that this philosophy involves struggle, competition and strife. Only through these does man find his potential powers. If despite these factors disciples of Darwin, Marx or Freud, for varying reasons, contend that man's destiny is predetermined, that it is inevitable, I give them the answer of Holmes, that "the mode in which the inevitable comes to pass is through effort".[41]

Natural law then, by this view, consists of those rules, which according to the totality of the experience of mankind, at any given time and place, seem most conducive to its greatness and goodness. This view does not require one to choose at his peril the creed to which he will adhere. It presupposes the commission of error. It contemplates periods of regression. It gives a degree of authenticity to all religions, all faiths and all creeds. This is not to say that they are all equally "true"—they may be incompatible—but only that man, in acting in accordance with his deepest insights, is traveling along the devious and tortuous road which leads to truth. This is in accord with his nature and therefore in conformity with the master plan. His action is therefore moral. The historian, Toynbee, believes that all the higher religions are simply separate ways to the "City of God".[42]

I believe this is what John C. H. Wu, the distinguished Chinese jurist and philosopher, had in mind in a letter to Mr. Justice Holmes in which he said, "When the jurists . . . say that there is no such thing as an immutable unchangeable natural law, they are unconsciously proclaiming a principle which is itself valid in all times and places. In other words their statement denying existence to the pseudo-natural law is really establishing the genuine natural law, which requires change and growth in human institutions and makes possible the evolution—the conscious evolution—of mankind."[43]

Despite the diversity of beliefs and the competition in ideas which this philosophy encourages, there runs through it all the unifying force of tolerance and humility. "Life is a roar of bargain and battle" said Holmes, "but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole."[44]

The Law Governing Man . . . *Subjective, Not Objective*

We have seen that in certain regions, the behavior of physical things seems to be controlled by law, but this law may not be real or objective, but only a mental device to enable the mind to comprehend what it sees. We have seen also that the behavior of biological creatures, in many respects, seems to be controlled by laws. These laws also may not be objective but only subjective. They are true only insofar as our knowledge goes or as judged by our frame of reference. We are therefore not warranted in saying that these laws are absolute.

Man, differing from things and other animals, is capable of abstract thought and free choice. Laws having to do with his own conduct are not merely physical or biological. Within limits, man has power to make law which governs his own behavior. These laws deal with what he ought to do rather than simply with what he does. They are entirely the product of his mind, but since the mind has the capacity to remember events, it takes experience into account in making its choice of laws.[45] These laws are also subjective, not in the sense that they are devised for understanding behavior, but in the sense that they are devised to guide behavior.

It is not my purpose to trace the growth of law. Suffice it to say that conduct that is found to be good, useful and needful gradually becomes habitual, traditional and customary, and finally becomes formalized in court decisions, legislation and codes.[46] Frequently this process is reversed. If a new traffic plan is needed for a metropolitan area, it does not grow out of custom. A plan involving stop lights, one-way streets and no-left turns is enacted and put into effect. If the new plan is found to be good, general compliance will follow. Here the pattern of conduct is determined by the law. So not only does custom make law, but law makes custom.[47] Whether the law against murder came before or after the custom against murder it is unnecessary to say. In either case, someone first had to conceive the idea that murder was wrong. In either case, the law resulted from needs. With occasional regressions during the last 5000 years, law would seem to have gone through a conscious evolutionary development.[48]

I believe that this is a positive philosophy. It is based upon the postulate that God has endowed man with an expanding capacity to determine what is moral and then by effort to adhere to it. If rules are good, the mind of man is such that it can be persuaded that they are good. In general those ideas which are the fittest will survive. Those that are unfit will die. Or as Holmes put it, "The best test of truth is the power of the thought to get itself accepted in the competition of the market place."[49] Hence, by this philosophy, man accepts those moral values that have stood the test of time and experience and uses them as the foundation upon which, by his own efforts, to build toward a higher destiny.

41. Holmes, id. 305. It has been suggested that while the destiny of any individual may be in his own hands, the destiny of mankind is predetermined. Krutch, *op. cit.* 153; Dampier-Wetham *op. cit.* 474.

42. TIME, October 18, 1954, page 110. See also du Noüy *op. cit.* 179-180.

43. John C. H. Wu, WHEN EAST MEETS WEST 94-97.

44. Holmes, SPEECHES 97. Du Noüy expressed the same idea in these words, "Without combat, evolution would stop; it would indicate that an equilibrium has been reached; man would no longer have the call to perfect himself." Du Noüy *op. cit.* 145.

45. For an admirable discussion of the progress of morality through experience see Jerome Hall, LIVING LAW OF DEMOCRATIC SOCIETY (1949) 78-81.

46. Fuller believes that the "common law imperceptibly becomes a part of men's common beliefs and exercises a frictionless control over their activities which derives its sanction not from its source but from a conviction of its essential rightness." Lon L. Fuller, THE LAW IN QUEST OF ITSELF (1940) 134.

47. One of the conditions which influences the custom of men is the law itself. See Morris R. Cohen, REASON AND LAW (1950) 164.

48. See René R. Wormser, THE LAW (1949).

49. *Abrams* v. *U. S.*, 250 U. S. 616, 630.

The Trial of Beria and Aides for Treason

(Continued from page 412)

person is exceedingly weak".[42] Under Article 58-1 (C) of the Criminal Code, the thread of complicity extends to members of the defendant's family. Thus:

> In case of an escape or flight abroad of a military person, the adult members of his family, if they have aided in any respect in the preparation or in the carrying out of the act of high treason, or if they knew of such an act but failed to inform the authorities are to be punished by imprisonment for a term of from five to ten years, with confiscation of all property. *The remaining adult members of the family of the traitor, who have lived with him or who were dependent on him at the time when the crime was committed, are to be disfranchised and exiled to the distant districts of Siberia for a term of five years.*[43]

In the case of a person in active military service, complicity is established by the failure to denounce an act of treason, whether in the course of preparation or actually committed. The punishment for such an offense is imprisonment for a term of ten years.

In summing up the arguments for the prosecution at the 1937 trial, Vyshinsky gave this Soviet definition of complicity in counter-revolutionary crimes:

> There is an opinion current among criminologists that in order to establish complicity it is necessary to establish common agreement and an interest on the part of each of the criminals, of the accomplices, for each of the crimes. This viewpoint is wrong. We cannot accept it, and we have never applied or accepted it. It is narrow and scholastic. Life is broader than this viewpoint. Life knows by examples when the results of joint criminal activity are brought about through the independent participation in such activity by individual accomplices, who are united only by a single criminal object common to all of them.
>
> To establish complicity, we must establish that there is a common line uniting the accomplices in a given crime, that there is a common criminal design. To establish complicity, it is necessary to establish the existence of a united will directed towards a single object common to all the participants in the crime. If, say, a gang of robbers will act in such a way that one part of its members will set fire to houses, violate women, murder and so on, in one place, while another part of the gang will do the same in another place, then even if neither the one nor the other knew of the crimes committed separately by any section of the common gang, they will be held answerable to the full for the sum total of the crimes, if only it is proved that they had agreed to participate in this gang for the purpose of committing the various crimes.
>
> In this case ... we are dealing with a conspiratorial group ... united by a will common to all its members, by a criminal aim which is the same for all of them. The concrete crimes which were committed by the individual criminals were only particular cases of putting into effect this plan of criminal activities, which was common to all of them.
>
> *This community of criminal activity is legally expressed in the charge preferred against all the accused and dealt with in Article* 58-11 *of the Criminal Code of the R.S.F.S.R.*[44]

This, however, does not mean that all of the defendants must answer to the same extent, for the court may individualize the punishment according to the "concrete part" of each in the case.

Active Struggle Against the Revolutionary Movement During the Tsarist Period. In addition to the charges discussed above, the indictment against Beria also alleged violation of Article 58-13 of the Criminal Code which

> prohibits active work or active struggle against the workers class and the revolutionary movement, manifested by responsibility for either secret (agency) employment during the Tsarist period or the counter-revolutionary government in the civil war.[45]

This section of the Soviet Criminal Code is an extreme modern example of *ex post facto* legislation. Aimed at the annihilation of agents of the former regime, it prescribes capital punishment for persons who as officials or as members of the Tsarist secret police participated in oppressive measures against the revolutionary movement. Officials who acted *secretly* are to be punished.[46]

The judgment of the court declared that the criminal, treasonable activity of Beria, and the establishment by him of secret connections with foreign intelligence services, dated back to the civil war. In violation of Article 58-13 of the Criminal Code, Beria, while in Baku in 1919, committed treason, having occupied the post of secret agent in the intelligence services of the counter-revolutionary Mussavat Government in Azerbaijan, which acted under the control of British intelligence organs.[47] In the following years up to his arrest, the court found that Beria continued and extended his secret connections with foreign intelligence services.

The Soviet Concept of "Proof" in Counter-Revolutionary Trials. The court announced that the "guilt of all the accused ... was fully proved in court by genuine documentary data, personal notes of the accused, and evidence of numerous witnesses".[48] The Soviet concept of proof in criminal trials, however, has been challenged before. Thus concerning

42. Margaret Mead, SOVIET ATTITUDES TOWARDS AUTHORITY (The RAND Corporation, McGraw-Hill, 1951) page 35.
43. UK, RSFSR, 1926 (as amend.), Article 58-1 (C). (emphasis added).
44. A. Y. Vyshinsky, SUDEBNYE RECHI (Moscow, 1948), pages 535-536.
45. UK, RSFSR, 1926 (as amend.), Article 58-13.
46. UK, RSFSR, 1926 (as amend.), Article 58-13.
47. PRAVDA, December 24, 1953.
48. *Ibid.*

the earlier Moscow trials, Deutscher says that "the confessions of the defendants were the only basis for the proceedings and the verdicts. Not a single piece of evidence that could be verified by means of normal legal procedure was presented."[49] In summing up the arguments for the prosecution at the 1937 trial, Vyshinsky referred to the "proofs" that had been presented in that case:

> You cannot demand that cases of conspiracy, of *coup d'état,* be approached from the standpoint: give us minutes, decisions, membership cards, the numbers of your membership cards; you cannot demand that conspirators have their conspiratorial activities certified by a notary . . . we have a number of documents to prove our case. But even if these documents were not available, we would still consider it right to submit our indictment on the basis of the testimony and evidence of the accused and witnesses and, if you will, circumstantial evidence. . . . I can quote a brilliant authority on the law of evidence such as the old, well known English jurist, William Wills, who in his book on circumstantial evidence shows how strong circumstantial evidence can be, and how, not infrequently, circumstantial evidence can be much more convincing than direct evidence.[50]

And he added that the Soviet court is required to appraise the proofs offered in evidence in accordance with its convictions arrived at "after examining all of the circumstances of the case taken as a whole".

One Method of Proof . . . *The Soviet "Confessions"*

One of the techniques employed by the Soviets to obtain proofs in cases involving counter-revolutionary crimes has been to elicit confessions from the accused during the preliminary investigation, and then to have these confessions reaffirmed in court following presentation of the evidence. Thus, Beria and aides, confronted by the "evidence" at the trial, are reported to have confirmed the testimony given by them at the preliminary investigation and again to have admitted their guilt.[51] In connection with the Moscow trials of 1936, 1937 and 1938, Louis Fischer suggests that certain "political deals" were arranged with each defendant whereby he was granted some important concession in return for his confession.[52] It has also been suggested that possibly some type of intense duress was employed, *i.e.,* physical torture or threats against the defendant's family. According to Herbert Dinerstein, surviving witnesses of these earlier trials are in general agreement that "physical torture was *not* used in the examination and interrogation of the main figures. . . ."[53] Several ex-communist writers who lived through the purges are said to agree that the accused confessed as a "last service to the party". A recent study (1949) has explored the possibility that "the Russians have developed and are now using some form of hypnosis, possibly in conjunction with drugs and other treatments, as a technique for eliciting confessions from persons who, under ordinary forms of duress, would not be likely to comply with demands for a public recantation".[54] A wide variety of experiments in hypnosis were conducted by Soviet psychologists during the years 1923 to 1930. A report on experiments with hypnotically implanted crimes was published in 1932 by A. Luria, a professor at the Soviet Academy of Communist Education.[55] Research at the State Institute of Experimental Psychology in Moscow demonstrated that "hypnosis could be used to induce an innocent person to develop intense guilt feelings and to confess to a criminal or immoral act which he did not commit".[56]

In the preceding discussion, an attempt has been made to record a strictly factual account of the Beria trial, based on published documents purporting to be the indictment, the judgment and the sentence of the court. All of the facts concerning this trial, however, have not been available, mainly because the Soviets themselves have failed to make public a complete transcript of the record, including the testimony and interrogation of the witnesses and defendants. This has created a number of important conjectures: (1) that there may have been no trial at all, but merely documents published in the state-controlled press which purport to be the indictment, the judgment and the sentence of a court; (2) that a trial was conducted, but that the proceedings were so unorthodox that the Soviets prefer not to disclose what occurred at the trial; and (3) that a trial was conducted, but that the evidence and testimony failed to substantiate the charges contained in the indictment, and the defendants were executed anyway.

It is interesting to observe, in this connection, that the liquidation of the Beria group in 1953 without public trial represents the abandonment, for the moment at least, of the Bolshevik device of "show trials"—*i.e.,* the trying of accused Bolshevik leaders in public. Most of the important earlier Moscow trials of 1936, 1937 and 1938 were public trials, and complete transcripts of the legal proceedings were published in Russian. An official English language version of each trial was later re-

49. Isaac Deutscher, STALIN (New York, 1949), page 373.
50. A. Y. Vyshinsky, SUDEBNYE RECHI (Moscow, 1948), page 459.
51. PRAVDA, December 24, 1953.
52. Louis Fischer, THE LIFE AND DEATH OF STALIN (New York, 1952), page 29.
53. Herbert S. Dinerstein, "Purges in the Soviet Union and in the Satellites", P-421 (The RAND Corporation, Santa Monica, August 3, 1953), page 5.
54. Irving L. Janis, "Are the Cominform Countries Using Hypnotic Techniques to Elicit Confessions in Public Trials?" RM-161 (The RAND Corporation, Santa Monica, April 25, 1949). This is a study of some of the "incomplete unclassified material which serves to indicate that there is *at least some small chance* that the Cominform police are making use of such techniques." *Ibid.,* page 2.
55. A. Luria (Trans. by W. H. Gantt), THE NATURE OF HUMAN CONFLICTS (New York, Liveright, Inc., 1932).
56. Janis, *op. cit.,* page 3.

leased by the People's Commissariat of Justice.[57] Although the Prague trial of November, 1952, was secret, it was recorded and some of the testimony was subsequently broadcast over the radio.[58] It is conceivable that similar recordings were made of the proceedings at the liquidation of the Beria group, but that these were not satisfactory for public communication, possibly because the defendants refused to cooperate.[59]

The lack of *legal* commentary following the Beria trial is made conspicuous by the amount of *political* commentary which preceded the trial. Thus, a widespread program for the villification of Beria got underway, in the Soviet press and by organized speakers in various parts of the Soviet Union, immediately after his "exposure". Six months before he was brought to trial to answer the charges, Beria had been tried and convicted by the Soviet state-controlled press and platform. On June 10, 1953, the newspaper *Pravda* published an editorial attacking Beria. It consisted "of three parts: paragraphs 1-6 describe, in bold outline, the achievements of Socialism, the failings of capitalism, and the resulting attempts of capitalism to subvert the Socialistic order. Paragraphs 7 and 8 reprint the Central Committee and Supreme Soviet communiques which accuse Beria of acting in the interests of foreign capital; and paragraphs 9-15 expound Beria's crimes. The last twelve paragraphs set out the lessons to be drawn."[60] On July 11, 12, 13 and 14, Soviet newspapers devoted their entire second pages to accounts of meetings taking place in various parts of the country at which speakers denounced Beria as a traitor.[61] On July 31, 1953, Beria's book on Stalin was repudiated in Georgia, because it "... contained a whole series of gross errors, contradictions, and confusions ... [and] is detached and onesided".[62] In the press and from the platform, the former M.V.D. agent was described by such epithets as: "an agent of international imperialism", "a vile provocateur and enemy of the party", "a bitter enemy of the party and the people and agent of international imperialism".

Beria's career terminated just one step short of the top political post in the Soviet government. He was the second-ranking Moscow leader when removed from office and imprisoned. It was necessary, therefore, that his liquidation, and that of his close followers, be conducted within an alleged legal framework. Accordingly, the defendants were charged with having committed the highest state crimes, the penalty for which is death. They were then tried under the procedure of a law which denied the benefit of counsel, which allowed the indictment and statement of charges to be withheld until twenty-four hours before the hearing in court, which denied the right to appeal the sentence to a higher body, and which called for punishment by death immediately following the conviction.[63] Under this procedure, it was possible for the affair to be disposed of with the utmost haste—less than a fortnight elapsed between the disclosure of the indictment and the execution of the death sentence. It is clear, therefore, that this was a *political trial*, even if the formality or ritual of a legal proceeding did exist.

An interesting sequel to the Beria affair occurred in January, 1954, when

> the State Scientific Publishing House sent to subscribers of its *Soviet Encyclopedia* a recommendation that they remove, preferably with shears or razor blades, pages 21 to 24 of Volume V. To substitute for those pages, the publishers ... enclosed four new pages including, among other things, a picture of the Bering Sea. The space to be filled ... would result from the removal from the BER section of the encyclopedia the biography and portrait of the late Lavrenty P. Beria.[64]

The "ritual of liquidation" having been successfully completed, the Soviet leaders apparently no longer wish to be reminded of Beria, either his name or his portrait.

57. The Case of the Trotskyite-Zinovievite Terrorist Centre (People's Commissariat of Justice of the USSR, Moscow, 1936); The Case of the Anti-Soviet "Bloc of Rights and Trotskyites" (People's Commissariat of Justice of the USSR, Moscow, 1938). No record was published of the trial of Tukhachevsky and his generals in 1937.

58. See, "Foreign Broadcast Information Service", November 20 to December 2, 1952. It is probably untrue that "The proceedings are broadcast directly from the Court." Cf. For a Lasting Peace, For a People's Democracy Bucharest, November 28, 1952, page 2.

59. Nathan Leites, The Ritual of Liquidation (Illinois, 1954), page 394.

60. J. Miller, *Soviet Documents*, September, 1952, to December, 1953", 5 Soviet Studies 374 (April, 1954).

61. See Pravda and Izvestia for these dates.

62. Zarya Vostoka, July 31, 1953.

63. See note 13 above.

64. Fortune, February, 1954, pages 96-97. In an article in Pravda, entitled "Constantly Strengthen Socialist Law Enforcement", Prosecutor-General of the U.S.S.R., R. Rudenko, issued this warning: ". . . Beria and his accomplices were exposed as agents of foreign imperialist circles and condemned by a Soviet Court in conformity with the law and the unanimous will of the people . . . attempts by any adventurist, careerist elements hostile to our state to take advantage of this or that link of the Soviet state machinery for their criminal, subversive aims . . . are doomed to fail." Pravda, January 5, 1954.

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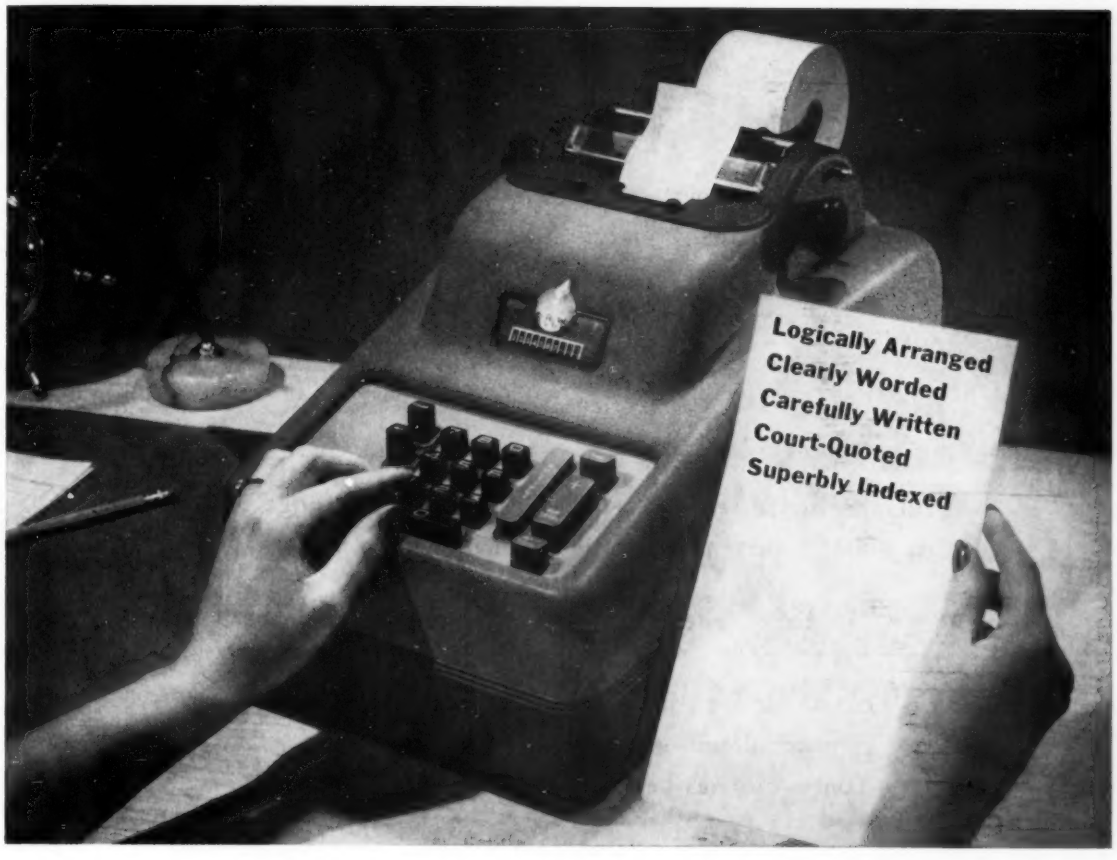

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